When the words heirs is made use of in a statute, you must resort to the com. law to know its meaning - If the words of the rule are dubious, the words of the context should be consulted to explain them - and you may resort to the preamble for the purpose of discovering the meaning of the Legislature - It is also a rule, that when there are a number of laws, & a doubt arises on the construction of any of them You may resort to all to find the meaning of each law -

Municipal Laws

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1 Kg. 365. Par. 40. Plow. 20. L. Ray. 1028.

The words of a law are always to be understood as relating to the subject matter of it -

See Ruth for the Institutes on Natural Law Ruth. Inst. Ch: 7. an excellent treatise - Ch: 7.

The effects & consequences of different 2 Bac: 66 constructions are always to be regarded. as where the sentence is ambiguous & 1 Mod. 32. two constructions may be given - that which is most reasonable is to operate -

When words have a very absurd meaning the rule is you may deviate a little -

The reason & spirit of the law is always to be consulted - This is the grand criterion in the construction of all laws & contracts - Coke says the reason of the law is the life of it. & that he who knows not the reason of the law knows not the law itself - -

Municipal Laws

And from this rule arises the equity of the law. which Puffendorf defines to be "the correction of that wherein the Law by reason of its universality is deficient."

By the equity of law is meant the reason & spirit of it. This reason & spirit operates two ways.

1. Vin: 14. 526. 1. 24 D. 50: 431.

Municipal Law is divided into two kinds the Lex scripta, or written law & the Lex non scripta, or the unwritten Law.

Of the Lex non scripta

This includes 1. The common Law or general customs. properly called Common Law. These are called unwritten because their original institution is not set down in writing & their validity is not derived from that source but their validity is founded on general & immemorial usage. And derives all its authority therefrom.

The common Law is divided into three kinds 1 General customs
2. Particular customs
3. Particular Laws observed by particular courts & general jurisdictions.

Municipal Law

The Common Law like all other Customs is founded on general & immemorial usage - The time of legal memory is dated back to the time of the accession of Rich. 1. to the throne of England in the 12th Century.

2 Bl. 31. 2 Inst. 238-9

The Common Law is to be found in the records of courts of Justice & in books of reports - And the decisions of courts are evidence of the Common Law, and not the Law itself - If the decisions were Law, there could be no reversal of an erroneous decision - The decision of courts is merely a prima facie evidence of Law & may be rebutted

1 Bl. 63.

Precedent. A precedent is a former judicial decision on the point in question - and is not to be disregarded but to be observed unless manifestly unreasonable, erroneous & absurd - It is prima facie evidence of what is Law, therefore the onus probandi lies on him who would prove it not to be Law - It is very important that precedents should be observed, otherwise the Law will be unstable - And certainty is very desirable in any system of Laws —

Principia of Law

A civil State cannot exist without Common Law - Whence did the Com. Law originate? - In legal contemplation it is immemorial - but there must have been a time when it began -

In point of fact the Common Law was built up by Courts of justice - And is a stupendous fabric of human wisdom - It is a perfect System of ethicks -

Many branches of the Common Law have grown up since the time of R. I & 2. - As the Law of executory devises, Paraphernalia & Mercantile Law - Indeed L^d Mansfield is said to be the founder or father of mercantile Law - As to the foundation of these laws, the legal notion is that this Common Law has always existed in the breast of the Judges, & was the Law in the time of Alfred tho' there never was such a thing then known as Mercantile Law -

Particular Customs - Particular laws are local customs or usages, and they differ from prescription which is personal one - As particular customs are not a part of general laws, Courts are not ex officio bound to take notice of them - They must be specially pleaded -

Public laws need not be pleaded. as the judges are bound ex officio to take notice of them — Municipal Law

Particular laws or customs are supposed Laws grown out of the common Law.

When common law or custom is pleaded & denied, its existence must be tried by a jury; but if the existence of a custom has once been tried, it need not be again, even tho' the trial was not between the same parties. —

But to the general rule that judges are not bound ex officio to notice particular laws, there is an exception in case of Gavelkind & borough english customs the existence of which need not be pleaded. —

Mercantile Law is generally called a local custom, but it is not in fact a local usage, as judge Blkstone says, but is a branch of the com. Law as much as canons of descent. 3 Bro. 49. Ray. 175 2 Bl. 2 461. 47 Chit. 13.

The law merchant need not be pleaded specially, but the judges must take notice of it ex officio as much as any part of the Common Law. This evinces that it is a part of the Common Law. Salk. 125. Doug. 653

The law merchant is never tried by a jury and is never proved. 2 Bur. 1210. 1222. 1 Bl. Rep. 294 4 T.R. 206. Chit. 109.

Principal Law

It is said that when the Law is doubtful a merchant may be called upon to shew what the custom is; but this is not to prove the custom but to shew the Law

Cit. 13. 109. Dun. 116. T.R. 200.

This practice has been denied to be legal—

Legality of customs. Customs to be good must extend back beyond the memory of man

2dly They must have been uninterrupted for if they have been interrupted, they are not good - they do not extend beyond the memory of Man -

3. A custom to be good, must have been peaceable & acquiesced in, otherwise it is no law for in this case the acquiescence makes it law -

4th. It must be reasonable, or rather not unreasonable - But the onus probandi of the unreasonableness lies on him who would set it aside -

5th. It must be certain - And indeed an uncertain custom is no custom at

6th. Every custom must be compulsory or binding, otherwise it will not be law - Lastly. customs must not be contradictory - If they are not consistent they are not good - It is bad pleading to say there is another custom - That which is last must rather be denied -

It is a rule of construction that customs derogating from the com. law must be construed strictly - this is exemplified by the custom of Gavelkind - All particular customs in England submit to the royal prerogative - Mirror Caldw 1 Inst. 15.

Particular laws, are the third branch of the English law, which are observed in certain Courts as the Ecclesiastical These laws become obligatory in England in consequence of their adoption in that kingdom rather than from any intrinsick authority of their own - For the roman law as such in england is not binding but is made so by adoption -

The common law of England and the Statute law of that kingdom so far as adopted in the U. S., are binding here from the principal mentioned in the former rule. In the State of N. York however the Statute law of England is not the law of that State - 1 R.L. N.Y. 350.

The Com: law is prima facie binding in all cases, but may be set aside when shewn to be evidently absurd & inapplicable to the people of this Country -

The Courts of Connecticut have deviated in some considerable degree from the common law of England - This has raised a question whether the State of

10. Connecticut could have an unwritten
unwritten law Law, distinct from the Com. Law of England
It was urged that she could, and argued
before the S. C. of U. States — The objection
was that there could be no com. law
because no immemorial usage —

This objection, that the common law
must depend upon immemorial usage
& that the S. of Con. can have no im-
memorial usage, or one that extends
to the time of R. I. is wholly inappli-
cable here for these States did not
exist at that time — But sixty years
after the time of R. I. a custom 60 years
old was good — therefore even in England
a custom 60 years old was good — And
therefore we certainly may have
law or custom more than 60 years
old which will answer the objection.
The S. C. of the U. S. decided in the case
above mentioned, that there might
be a common law in the State of Con.
distinct from that of England —

By the constitution of the State of
ca: 35. N. York — the Common Law of England
is law in that state except when
altered by Statute —

Municipal Law

Lex Scripta or written Law.

The Lex Scripta is the Statute Law.

Statutes are either Public or Private

A public Statute is one that regards the whole community.

A private Statute is one that extends only to a part or to an individual which is rather an exception to a public Law or Statute.

Most Statutes found in the books are public. The distinction between public and private Statutes is not so obvious as not to need illustration. Many Statutes which relate only to a particular class of men are public Statutes. A Statute for instance relating to merchants is a public one.

The rule is this, if the class amounts to a genus it is a public Statute; if it extends only to a Species it is a private one. To distinguish these the rule is, if there may be a subdivision it is a genus, if not it is a species. Thus a Statute which relates to all mechanics is a public statute. but one which regards only tailors or shoemakers is private, as in these case there can be no subdivisions.

4 Co. 76. 1 Wil. 86 19 Vin. Abr. Ray. 120 301.

12.
Munic. Law.
In England every Statute which concerns the King is a public Statute —
Co: 77. Co. 20. 3 D. Co. 227.
A Statute which regards only a Species of individuals is regularly a private one, but when there is a forfeiture to the King or State it becomes a public one —
Kin: 429. Bac. 640.
Co. 65. Co. 57. 2 Mod. Ag. 613.
A Statute which concerns the public revenue is public —
All Statutes are either declaratory of the old law or remedial — But all Statutes, as Blackstone says, are not remedial of the Common Law, or declaratory of it, for they may be declaratory of Statute Laws —
Statutes are either beneficial or penal — All Statutes inflicting a punishment or penalty are penal —
Bac. 480. Co. Ja. 414.
And in general all Statutes giving greater remedy than the rules of natural justice require are in effect penal; but they are not called penal —
The latter division of Statutes is sometimes divided into remedial or penal, but in this case remedial is contradistinguished from penal —
Bac. 650. Mily. 126. T.R. 259. Co. 7. D. Salk 212.

Statutes giving costs are deem'd in England penal - Costs were not known at common law. But the unsuccessful party was amerced* -

13. Municipal Law.

* 1 Burn. 57. 2 Inst. 205. 1 Salk 205. Cas Tth. 119. 4 Mod. 7. Cow. 382. 1 Wils. 125. 4 T.R. 758. 7 Ves. 25. Cow. 361.

But tho' every Statute inflicting a penalty is penal, yet an action brought by an individual to recover a penalty is a civil action & Debt is the proper action - In Connecticut Indeb: assumpsit will -

All Statutes are either affirmative or negative - This division however is of no importance -

2 Inst. 200. 1 Bl. C. 89.

In England every Statute commences its operation on the first day of the Session at which it is made, unless a particular time for its commencement is point out - Hence it is usual to prescribe the time when an act of Parliament shall take effect -

Hob: 111. 222. 309. Bay. 376. 19 Vin. 491. 1 Bl. 310.

This rule is founded on a fiction that the Session of Parliament is but one day -

Hence it is that if two Statutes are pass'd one Session on the same subject, both stand and if repugnant destroy each other -

Municipal Law.

Construction of Statute Law.

This is merely the investigation of the will of the Legislature & to construe a Statute equitably the intention of the Lawmakers is to be discovered & & aid the discovery the following rules may be observed -

1st In the construction of remedial Statutes three points are to be considered -
1st The old Law, 2d the mischief 3d the remedy
Co. 7. 1 Sol. Sq. The two first are those which are to be principally regarded in construction These will show what remedy was intended to be provided - And generally the reading a Statute will show what is the intended remedy -

Rules with regard to Laws in general will apply also to Statutes -

It is a general rule that penal Statutes be construed strictly - They are to be construed so as to acquit the Offender - If he is in the letter and not in the Spirit of the Law he cannot be punished - And on the other hand if he is in the Spirit and not in the letter he is not to be punished - Therefore in order to punish a person he must be within the letter and Spirit of the Law -
Leach C.C. 1:70: 07. 295.

order to make a joint tenancy the parties must acquire the property by one and the same right or title.

A husband cannot devise away a chose in action, or a chattle real, or any kind of the wife's property, not in possession. In this they both agree. Co Lit 46. 300 3 Atk. 1 Cow: 552 Pre: Ch: 410 3 P. Wm: 697. 2 Ves: 270 Geo El: 207. 396. Bob: 3.

Alteration of the Common Law of England. This has been effected partly by Statute and partly by the Court of Chancery. This Court have adopted this rule that if a husband has made a settlement upon his wife they shall be deemed a purchase of her choses in action. Pre: Ch: 163. 392. 3 P. Wms 199

Therefore if there is a settlement, this is deemed an absolute purchase of the wifes choses in action, and they vest absolutely in the husband.

By Statute of New York, Husband after the death of the wife, may distrain for or Lawsuit action of debt for rent in arrear before the wifes death. R.L. 140

Also by the St. of N.Y. The Husband may demand & have administration of the rights credits & other personal estate of the wife dying intestate. R.L. 139.

Husband & Wife.

History of the alteration by Stat.

By the Law of our Saxon ancestors a mans property on his death was divided into three parts. A rationabilis pars went to pay debts. A rationabilis pars to the wife, and a rationabilis pars to the children.

The Clergy were generally appointed to take care of this business and make this distribution. This appointment was probably made by the King or Nobles. The Clergy pretended this appropriation and this estate to pious uses as it was stiled, and thereby took the estate to themselves.

The Legislature finally interposed and made a law, that the Bishop should appoint an administrator out of the next and most lawful friends of the deceased. This Stat. was made in the reign of Edward 3.

The administrators finally said that as the bishops were not compelled to distribute, they were not

and strange as it may seem, this matter came before the court and they decided that there was no law to compel the adm^r to distribute. Hence the Stat of Ed. 3. was made. Adm^rs are compelled to distribute in N.Y. after debts funeral charges & just expences are deducted amongst the wife & children or children's children, if any. If not to the next of kin & the intestate. To the wife one third part of the surplus age, and all the residue by equal portions to and amongst the children &c. But no representation shall be admitted among collaterals after brothers & sisters children.

Husband & Wife.

R. 2. 530.

After the death of the father if a child die sole & without children in the life time of the mother, the brothers & sisters & the representatives of them shall have an equal share with her.

R 2. 539

This act does not extend however to the estates of femes covert, dying intestate, but the husband has administration.

Husband & Wife.

Marriage Settlements

In case of a marriage settlement made to be a purchase of her choses in action, must be made previous to the marriage, and not a joinure in lieu of dower. One alteration of the Common law is the Stat. Ch: 2 making the husband entitled to the surplus of property after the payment of her debts.

Another Statute altering the Common law is one made in the reign of Hen 8. respecting rent heretofore mentioned page 511.

As a general rule the husband is entitled to the wifes choses in action. Yet when there is a judgment obtained during coverture, if she dies, it survives to him, tho' still it is properly a chose in action in case the husband dies first the debt goes to the wife, and this upon the principle of joint tenancy where the jus accrescendi prevails.

Judge Reeve supposes, that in Connecticut the judgt would not survive to the husband -

What right does the husband acquire to the real estate of the wife? Husband & wife.

He acquires an absolute right to the use and improvement of her freehold during the coverture.

But he may have a greater estate than this. An estate by the curtesy is, when he has a child born alive by the wife, which could have inherited the estate. In this case the husband has an estate during his life.

This estate must be in the possession of the wife at the time of coverture in England. But probably in Conn. all the owned whether in possession or not would be subject to coverture.

All that is necessary is that the child should be born alive, and that it could have inherited the estate. And N.Y. thinks there is only one case in which the child would not inherit, to wit an estate tail special.

The husband has coverture only in such estate as the wife was seized of during the coverture or at the time of the marriage. The estate must be a fee simple, or fee tail. In N.Y. however fees tail are abolished by statute. 8 Co: 41. 8 Co: 36. Co. Lit. 29. 2 247.

5 6.
Husband & wife.

There is one species of property which are called entlements, which go to the executors of the husband, and not to the wife when on her land in this case grass would not go to the Executor.

Over the real property of the wife the husband has no power to alienate so as to affect the right of the wife. 1 Roll. 34 pl. Sec. 11. 2 Bl. Com: 121 Co: Lit 29. Plow: 263. & the authorities heretofore cited on the subject.

There is a tenor in England called Gavelkind which was different from others. Among other things it made it a rule that an estate should descend to all the children alike and not to one only. And that the husband should be entitled to courtesy whether a child was born or not.

3 Atk: 393. 2 Ver: 340. 1 Bl: Com: 166. 3 P. Wms 327. — There is one species of property in England to which the husband acquires rights by courtesy. Viz. where there is a settlement made to the wife & her sole and seperate use. This doctrine however does not prevail much in the United States

The husband may acquire property through the wife after coverture If personal property is given to the wife, it vests immediately in the husband. So if a legacy be given to her. And choses in action given after marriage do not survive to the wife after the death of the husband tho' not collected - and here there is a difference between property acquired by the wife before and after coverture. In real property there is no difference -

Husband & wife.

Property given to the sole and separate use of the wife, was formerly vested in a trustee for the use of the wife. but this is now out of use and not deemed necessary being a mere matter of form. And in case an injury is done to this property the wife sues by her husband as trustee - Some dispute has arisen whether technical terms are necessary there have been decisions that the terms were not necessary provided the meaning was apparent and clearly expressed -

Husband & Wife

Liability of the Husband to pay the debts of the wife.

In consequence of the Marriage the husband is to pay the debts of the wife contracted before marriage. But the debts must be collected during the coverture. This liability does not arise from the circumstance of his having received property by the wife, for he is liable if he receives no property by her. But as he may have received property by her and as she is deprived of all means of acquiring property it would be unreasonable that there should be no remedy against the husband. But the debts of the wife must be collected during the coverture. Provided he receives never so much property by her yet he is liable for her debts only during coverture.

But the principle of his liability arises from this that the wife shall not be imprisoned.

If the husband dies the wife is liable without any property for the Exs. of the husband and not liable. Husband & Wife.

Suppose the husband and wife are sued and before judgment obtained the wife dies. It is a question whether the husband is not liable, upon this principle that no shall be de- 1 Role 351
feated by the act of God - Judge R. thinks 2 Ray. 1082
the suit must abate. We recommend 1 Cauth. 30
Elementary writers on this subject 6 Mod. 306
to find authorities.

What property does the wife acquire by the death of the husband.

She may acquire an interest in his personal property, provided there is more than sufficient to pay his debts. Or if he has made a will and given away his personal property she is defeated. Therefore in either of the above cases she is defeated as to personal property. If there is personal property she takes according to Stat. distribution 1/3. If there are no children nor legal representatives of them she gets half of the personal property after the payment of debts legacies &c.

60

Husband & wife.

Dower,

Is the interest the wife has in the real estate of the husband.

To his real estate the wife acquires the right of dower; which is according to the english law, (adopted in most of the U. S.) the right to one third of all the real estate in fee simple or tail, the husband was seized of during the coverture. This she has during her life. In Connecticut she is intitled only to one third of the real estate the husband dies seized of.

Curtesy and dower are different in some respects.

The husband has a right to all of her estate during his life; where she has only one third. But to intitle the husband to curtesy he must have a child born alive by the wife. This is not necessary to entitle the wife to dower. It is sufficient, that, if there was a child it would have inherited the property.

2 Bl: 131.
Plow: 511
10 Co: 49.

The husband cannot divise away his estate so as to defeat the wife of her dower. Husband & Wife.

This estate cannot be taken away by creditors, as the intrest of the wife is considered superior to that of the creditors.

It is laid down in the english law that the woman to be entitled to dower must be his wife at the time of the death of her husband. Therefore a divorce a vinculo matrimonii bars the wife of dower, because she is considered as having never been his wife the marriage being void ab initio.

According to the english law the husband by no manner of means can defeat the wife of dower. If he dispose of his property it is with the incumbrance of dower.

By Statute of N.Y. no estate of feme covert shall pass by her deed, unless acknowleged before a Judge of C. Court in Chy or Judge of C.P. on a private examination apart from her husband, to have executed freely without compulsion which shall be certified & indorsed on the deed. R.L. 470.

62.
Husband & wife.

The wife is intitled to dower in all property to which the husband has the right of possession as well as in that of which he was actually possessed

Bl. 131.

And for this reason that the wife cannot compel the husband to be seized - and the wife is not to suffer by the fault of her husband.

The right of the wife to dowers is applicable only to tangible estates and not to an ideal one - As in case of a Mortgage on the husbands lands made before coverture, the husband dying before redemption

Rawle 565
& 36. 155.

In this case he was never seized of the estate during coverture

In Connecticut the wife is to be endowed of Mortgaged estates

Husband & wife.

How may the wife be barred of her dower?—

There are many cases in the English law where she may be barred of her dower and some in this country.

If she elopes with an adulterer she is barred of her dower—

Committing treason with her husband bars in England. the estate is forfeited— It is doubtful whether this rule will prevail in the United States.

By stat. of N.Y. the conviction, attainder or outlawry of her husband will not bar dower— R.L. 54.

Another case in England is when she detains the title deeds of the estate in order to bar the heir of his right.

Again she may be barred by a jointure made before marriage R.L. 53.

When the jointure is after marriage the wife may make an election either of the jointure or her dower— ibid

It must be settled in lieu of dower otherwise it does not appear to be intended—

64

Husband. Wife.

It must be a competent livelihood this renders it rather indefinite and must be determined by the Court if it is as good as the dower tho' not a competent livelihood the court will not overset it -

2 Ves. 40 D3.

Co Lit. 351. 1 Bac: 209. 1 Bl: 555 1 Salk. 115. 1 Rol. 342. Moore 852. 2 Mod. 186. 10 Co: 49.

In the case of a jointure after marriage, after her election of either jointure or dower, she is barred of the other -

R.L. 53.

An adultress, is, by the Stat. of N.Y. barred of her dower, unless her husband willingly be reconciled & permit her to dwell with him

R.L. 54.

If a woman be ravished & afterwards consent to the ravisher, she loses her dower & inheritance jointure &c and the next of kin inherits -

R.L: 470

She is also barred of her dower by executing a deed & acknowledging before a Judge or Master Special apart from her husband that she executed it freely - which must be certified particularly on the deed

See ante 61.

How she may lose her dower after obtained.

If the husband is found to be an alien by commissioners appointed for that purpose after his death and dower is settled upon the wife, upon the happening of this event she is divested of it - as by the law of England an alien cannot hold property.

Another case in the english law is when the wife commits waste, as destroying houses &c - she is barred of dower. This rule has never been adopted in the U. S. - Alimony is no bar to dower.

Another case is when the widow attempts to alien a greater estate than she has; by the english law she forfeits her dower - By that N.Y. a woman who by favor deceit or collusion with the heir being within age. the heir when he comes of age shall have an action to demand the seizin of his ancestor. She may however show that she is intitled & still retain it. R.L. 52.

Husband & Wife

Paraphernalia.

1 Rol. 911. Moore 213. 2 Bl. Com.

are of two kinds, one is her cloathing & bedding; generally she takes the whole tho' where there is a large quantity in some case she may be divested of a part thereof; these vest in her absolutely on the death of husband.

This kind of paraphernalia cannot be taken by creditors, nor can the husband devise them away nor can the Executor take them.

The second kind of paraphernalia is her ornaments or trinkets, jewels, earrings &c. a gold watch has been held to be within the term. These are the husbands in his life time and he may dispose of them during the coverture - but he cannot devise them away like other personal property - But they are liable to creditors in case all the other personal property is exhausted but not otherwise, as this kind of paraphernalia is not exempted from creditors when there is not sufficient of other property -

Husband & wife.

It is a question in Connecticut whether the paraphernalia can be taken before all the real property is exhausted for the payment of debts. Judge R. supposes they cannot. On this subject see authorities in the margin.

3 Ath. 350
3 Pick. 369. 39
2 Pick. 436.
2 Ath. 104
10 N. H. 730

When the heir is liable to pay the debts in England, and the wifes paraphernalia are taken to pay them she may come back upon the heir to the extent he was liable. This may happen in the case of bond debts which the heir is liable to pay.

When a man makes a will that his real estate shall be applied to the payment of debts, the construction of law is that the personal property is first to be taken unless the intention of the testator is express that the personal property is not to be taken, In this case if the Executor takes the paraphernalia of the wife she may come upon the real estate to the extent of her paraphernalia.

60.
Husband & wife.

The Executor cannot resort to the paraphernalia until all the other personal property is exhausted. In case of legacies he may take the legacies but must account for them if there is other personal property sufficient.

3 Atk. 395.

There is another case where the wife may come upon the personal property. When the husband has in his life time taken the paraphernalia for a particular purpose not intending to take them away from her and dies before they are restored the wife after the payment of the debts may come in upon the personal property as a creditor for her paraphernalia.

Liability of the Husband to answer for the wrongs of the wife -

There is some difference between this kind of torts and contracts but in general the principal is the same - He is liable for the torts of the wife committed before the marriage, for he takes her bettes for worse - In case the husband dies Co Lit: 183. the action will survive against the wife as in contracts -

In what cases he is liable after the marriage.

In some cases the husband is answerable alone without the wife this happens when the tort is committed in his presence, as in this case the is presumed to be under the coercion of the husband - But if it is not done in his presence he is liable with her upon the same principle that he is for the torts committed before marriage -

70.
Husband & wife

This principle of coercion extends to no other case in our Law, and may in some cases operate unjustly against the husband.

Cro Car: 105. 255. 301 376. 2 Hawk: 123 7 Cro E: 356. 374. 9 Mod. 106. Moore.

When there is a joint liability the action will survive against the wife after the death of the husband. This principle of coercion extends even to cases of crimes of a inferior degree. It has been said that even in case of theft, if the husband was present, tho' he knew not of the theft yet is liable. but against this reason revolts.

1 Haw. 4. 4 Bl: 29 &c

But in crimes of greater magnitude the husband is not liable. tho' present, & ignorant of the crime.

In case of joint torts execution must issue against both husband and wife. and they may both be taken. but the wife cannot be taken without the husband, tho' the husband may without the wife per Lofft. But if the husband escapes the cannot be retained one moment afterwards.

Husband & wife.

But there is one way in the english Law, in which an estate can be made to take effect in future, this is done by way of remainder - but in this case another rule of law obstructs the power of the wife, which is, that no estate can be created on another's as in this case, the estate must be created on the husbands estate -

Judge R. supposes that a wife in Con.t may convey away her estate to take effect after the death of the husband, provided no right of his is effected. as there have a Statute declaring that an estate may be created in future as well by deed as by will. But the question has never arisen -

If the husband undertake to convey away a fee simple in his wife's estate without her consent the doctrine of forfeiture does not apply - as it would be a forfeiture to the wife - and consequently would be of no effect - what estate however the husband has is apt by the conveyance -

10 Co: 43.
Co Lit: 3
46. 356.
Rob. 225.
2 Ch: Ch 306
1 Rol: 349.

76.
Husband & wife

Altho the husband as a general rule can nullify the wife's purchase, yet there is one case when she acquires property, where he cannot avoid it viz - Where she acquires property by descent -

Where the wife has seperate property why cannot she bind her husband by Contract? The reason is that her Contract renders her person liable to imprisonment, & thereby affects the material rights of the husband. Yet a Court of Chancery will decree that the property shall be liable & may be taken, but the person cannot -

1 Bro: Ch 16.

How the wife may bind the husband by her Contract.

When the wife makes a contract it is the contract of her husband in consideration of Law for the wife is considered as his agent -

The principle of the liability of the husband as laid down in the book is on the ground of his agreement But this Judge R. supposes is not the

broad enough - for in some cases he is bound when he never has agreed and is never supposed to have agreed. The husband is bound in all cases when he agrees to the contract or authorizes her to contract by power of attorney and this need not be written.

As a general rule the husband is bound for all the contracts of the wife, which it is usual for wives to make in the State of Society where the person resides.

And if it is not usual for wives in general to make such contracts yet if it is customary for this man's wife to make them & he has not disagreed thereto he is liable.

Another great ground which embraces a great variety of cases, is this, that although it is not usual for the wife to purchase or bargain, when she does purchase goods & the husband assents to it, or suffers them to come into his house & family, tho' there is an express prohibition in the latter case he would be liable, provided the person who sells the goods did not know of the prohibition, or when it was not a reply to him.

7 D.
Husband & Wife.

But there is one species of contract the husband cannot prohibit the wife from binding him in, viz: When the purchases necessaries according to the rank and property of the husband principally regarding Property - In this case if the husband turns the wife out of doors he cannot prohibit her contracting for necessaries - But if she goes away of her own accord the husband is not liable, after the elopement has been notorious -

The doctrine laid down by the elementary writers is not true to its full extent - They say there must be an agreement of the husband to bind him - but in many cases there is no agreement, & in the last case there is a prohibition, but yet he is bound. The principle that governs in this case is that it is the duty of the husband to provide for the wife - Writers say, it is to be presumed that the husb. agrees to his duty. But this cannot be supposed, when the husband turns his wife out of doors - it is therefore idle to suppose it -

Separate Maintainance

When there is a seperate maintainance given to the wife by the husb: provided it is competent, the husb: is not answerable, the wife herself is liable.

Salk: 110
6 Mod. 239.
Stra: 1160.
1 Ld: 120.
2 Kent. 155.

The husband is sued alone, when the wifes contracts are binding on him.

There are some cases which seem not reconcilable with the general principle -

Where the wife purchased goods customary for wives to purchase, tho' not necessaries, & the goods were put off by the wife, or pawned for money to gamble - here it would seem that the person who sold the goods was not to blame; but that it was the misfortune of the husband - but the husband is not liable in this case - When the wife borrows money, ordinarily the husband is not liable but this depends upon the circumstances of the case - If the money is laid out in necessaries a Court of Ch: will allow the lender to stand in the place of the person who sold the goods and he will recover -

Ray 1086.

2 Show. 203.
1 P. W. 183.
1 Atk: 340.
Bun: 2170.

No Husband & Wife.

These rules apply not only to cases where there are wives de jure, but de facto.

Salk 116. Ray 444

Authorities to support the rule. Seperate maintainance is a case where it is laid down in one case that if the wife goes away with an adulterer, the husband is not liable, tho' there is no notice to the person who trusts the wife.

Str: 647.

There is one case when neither the husband nor wife are bound where the wife goes away from her husband and her elopement becomes notorious, if a person trusts her in this case, it is at his peril.

2 Bl: Rep: 1078. 1 Pow: 79. Stra: 875.

Where there is a special prohibition to a particular man the husband is not liable even for necessaries; but when it is to a number, it becomes general the rule does not apply. 1 Lev. 4. 1 Mod. 124. 1 Salk 279 307. The case in Salk applies to the rule where money is borrowed, and laid out for necessaries.

Husband & Wife.

Contracts entered into before marriage by husband and wife - These contracts are generally binding.

When there is a debt owing due to the wife from the husband, and he gives his bond and afterwards dies there is no question but the debt becomes the husband like all other choses in action - But writers have made a question whether if the husb. died leaving the bond uncancelled it would not survive against the executors - Judge R. thinks the bond would not survive, for the husband might have destroyed it at any time during the coverture - and during this time it was suspended and could not be collected - And it is a rule of the common law that a thing once suspended can never be revived -

All marriage settlements, jointures &c - are binding - and an agreement in contemplation of marriage is good - & the Court of Ch'y will decree it to be specifically performed -

N°2. Husband & Wife.

Therefore every agreement in contemplation or in consideration of marriage is binding either in Law or equity but by the Stat. of Frauds, it is necessary that it should be in writing. When a man gives his wife a bond in the form of a note, if it is in consideration of marriage a court of Chy will consider it as a covenant and decree a specific performance.

It has always been held that there is no remedy at law in this case, by the elementary writers but there have been two cases on this point & the only cases I have seen, both decide that the contract is good and binding at law - but but by a divided court. It is said there is a case in 2 P. Wms: upon which recognizes the same principle

Hob: 216. Cro Jas. 671. 2 P. Wms: 241 2 Atk 99. L Ray: 515. Carth: 51 Salk 325. 2 W. Bl: 10 note, where the principle, once suspended, always suspended, is recognized. Case in Hob. reported in Hutton.

1 Bl. rep 442.

Husband & Wife.

Contracts during coverture made by husband & wife -

As a general rule the contracts made by husband and wife during coverture are void - But the reason given by elementary writers is futile - viz: that they are but one person! But this is not in fact the case, for we have already seen that she may be liable for crimes they are therefore two persons - and to say they are but one is figurative language merely -

When there is a contract made to her sole and seperate use, during the coverture it is good, and binding on the husband - And where he has agreed she may have part of the profits, on butter or cheese for instance it is good.

3 Pick. 337.
1 Ray. 9.
1 W. Bl. 330
3 4 5 -

As to contracts respecting real property, this is done by indirect means, but is in fact a contract between husb. & wife - The husb. gives a deed to a third person & he deeds to the wife -

84

Husband & Wife.

This is mere matter of form, if it is impolitic for husband and wife to make a contract, the law should not be thus evaded. When it is conveyed to the this person he is seized.

This has been abolished in England and N.Y. by the effect of the Statute of uses. This Statute declares that use vests immediately in the person to whom it is given. In Connecticut there is no such statute & the old form is retained.

Co Lit: 112.
2 Inst. 64.
1 Atk. 270.
1 P. Wms. 126.

It has been a question whether wife can take a gift or donatio causa mortis, which is a gift in contemplation of death & has always this condition annexed to it, that if the donor recovers it is not to pass. In this case the wife takes the gift as being to her sole and seperate use.

1 P. Wms. 441.

Husband & Wife.

Articles of Agreement, entered into by the husband and wife to live seperate are binding whether made by the intervention of trustees or not - He is bound by any covenant respecting money to support her when seperate -

3 T.R. 5.
2 East. 28
1 H.Bl. 384
341. 351
2 Bro. Ch: 87
3 Bro. Ch: 614
1 Burn: 547

Legacies as has been mentioned go to the husband on the marriage but there is one species which do not. Where the father or any other person gives her money to be laid out in lands; in this case Ct. of Chy will decree that the money shall be thus laid out, and the deed given in the name of the wife -

But if the wife will go into a Court of Chancery & consent that the husband shall take the money this will be binding upon her as much as a deed in case she had the land & conveyed it with her husband -

If the husband covenants not to intermeddle with the estate of the wife, it is said he is estopp'd to do it -

1 H.B. 334. 351 -

1 H.B. 334
351

Husband & wife.

The husband is intitled to all the earnings of the wife - and they do vest in him, if for services performed during coverture.

Where there is an injury done to her person, the right to damages is his and stands upon the same principle as choses in action.

But the husband has a separate action anciently called, per quod servitium amisit, but now in times of greater politeness, per quod consortium amisit.

Slander stands upon the same principle as assault & battery or any other injury to the person of the wife / even here the husband may have a separate action.

Where adultery is committed with the wife, the husband has an action against the adulterer.

This is on different grounds.

1° The alienation of the affections of the wife by the seduction.

2° The disgrace brot upon the husband.

3° The probability of this having to maintain a spurious issue.

The damages may be aggravated or attenuated according to the circumstances of the case. If the wife has always sustained a good character, this is a ground for exemplary damages. but if a lewd woman, damages will be mitigated.

The plaintiff's own conduct may have considerable effect in the apportionment of damages. If he has barbarously treated her, this will tend to alienate her affections and therefore mitigate damages. But he will always be intitled to a recovery of nominal damages at least.

There is one case where L^d Mansfield supposed there ought to have been no recovery. Where the husband directly contributed to it. and has been as much to blame as the wife. and therefore has sustained no damages. But the decisions have in every case given as much as nominal damages.

A marriage must in this case be proved. a marriage by reputation is not sufficient.

Husband & wife.

Where there is a seperation of the husband and wife, if the wife has a child, the legal presumption is that it is the husband's*

B.N.P. 27. Dun: 2057. 2 P. 34 2. Comy. 162. 1 Bro. 113.

This is an action of *vi et armis* in form - This is on the ground that the wife has no will - But this is not in fact the case, for if the wife has no will it would be a rape - Judge Buller supposes the proper action would be on the case, & that this would be

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Power of the husband over the person of the wife.

It is somewhat difficult to determine what the law is now. It is easy to determine what it was. For by the old law the husband was allowed to chastize the wife tho the wife was not allowed to chastize the husband, It seemed to be on one side But this doctrine has been gradually abolished since the reign of Charles II and it is certainly unreasonable that it should be -

In the english law as it now stands the wife has the same right to chastize the husband, as the husband his wife - This, perhaps may be justified on both sides in certain cases

Husband & Wife.

But by the modern cases, it seems to convey this principle that the husband has a right to restrain the person of the wife, tho' she has not the right to restrain the husband 1 Haw. 130. 1 Bl. com. 444. Moor 874. 1 Sid. 113. 1 Bur. 445. 542, 634. 1 Hawk. 470.

You find it laid down in the books that the husband is justified in committing an assault & battery in defence of his wife, and so vice versa - But this requires some explanation. If the wife or husband was the aggressor neither of them are justified in joining the wrong done -

The true principle is, if one is justifiable, both are, and if the one is not, neither is the other.

90.
Husband & Wife.

Where husband and wife may be witnesses for or against each other.

As a general rule husband & wife cannot be witnesses for or against each other - But there are exceptions. It is said this is on the ground of interest, this however is not the true principle, for ordinarily a person may be a good witness if both parties consent - but in case of husband and wife they cannot be admitted even if the parties all consent - this seems to be for the purpose of preventing domestic bro-

4 T.R. 678. Esp. 720. Bac. 264.

To this rule there are some exceptions - Treason is one; for it is said that here the public allegiance is greater than the private.

1 Hawk. 606. B.N.P. 286.

Where either the husband or wife swears the peace against the other they are witnesses from the necessity of the case.

Haw. 4 32. B.N.P. 287.

There is one other exception, where the public complain for the abuse of the husband to the wife, or breach of the peace -

Dalton 116.

Husband & Wife.

The first case which happened is that of Lord Audley / Dutton 116/. which is one of the most disgraceful transactions mentioned in the books. This case decided that the wife should be admitted as witness against him.

There is another modern case in Stran: 633. which recognizes the same principle.

There are however many Eminent writers who have doubted the Law. & a great number of private opinions are against it. Judge Reeve considers it as settled by the case in Strange.

There are other cases which are said to be exceptions, but strictly are not so.

Where a man forces a woman to marry, she is a witness to prove the forcible marriage. but this is properly a case where she is not his wife. B.N.P. 287. Ep. 721. Str: 504.

Another case is where he marries a woman when he has a wife living. the second is a witness. But in this case she is not his wife.

92.
Husband & Wife.

As a general rule the declarations of wife are not to be admitted against husband, but there are exceptions. Where the matter in dispute is in the province of the wife. As respecting family articles, when the wife had said that the articles had been received & the husband disputed it in this case the declarations of the wife may be admitted against the husband.

Stra 427.
R. N. P. 207.

When husband & wife must be joined as Plaintiffs.

The general rule is that they must always join where the cause of action would survive to the wife on the death of the husband. In case of disseizen of her lands, both must join to recover the possession. And in case of a debt due to her before marriage both must join. In case of an arrear, due to her before marriage

1 Rol. 347.
Cro Eliz. 137. 700.
1 Sid. 25.

they need not join, as it is given to the husband by Statute of Wm & Mary. But by the Comn. Law they must join.

Husband & Wife.

It is sometimes said that the husband is joined for conformity sake - but this is not the true principle, for they must join where the wife's debt is sued for, or she sues, the husband must join that execution may issue against him for the costs, as they cannot be collected of the wife, as it would render her liable to imprisonment. 1 Rol. 347. Co E. 5 37. Co Ch: 4 19. 1 Will: 224

In case of debt for rent in arrear after coverture, husband & wife must join at common law - but by Stat. Hen: 8. it goes to the husband & the wife has no interest in it. 1 Rol. 340

In trover for a conversion before marriage, of the goods of the wife they must be joined. but if the property was not converted till after coverture there would be no necessity of joining the wife 1 Sid. 25.

If a personal injury is done to the wife before marriage they must join, and so likewise if the injury was done after marriage, the principle which govern is the same - Yelv. 89. 1 Mow: 201 Co Ent. 501. 598 a 55. Co Ca: 90 1 Salk 119 Stra: 61.

Husband & Wife

If the wife sues alone her person is liable & therefore marital rights of the husband are effected - But where they live seperate this objection does not exist - and it would seem she might be sued alone.

Ste: 79.

Where the wife acts in another capacity the husband must still be joined, for the purpose of securing costs.

Salk 202

Where the husband may sue alone -

Where the action is for Seveins of the wife during the coverture, the husband may sue alone - like for injuries done to the emblements

Mod. 156. Salk 114. 2 Lev. 403. Rol. 347.

Where the action is for loss of service & company of the wife, the husband sues alone -

Salk 206. 2 Lev. 140. Cro. El 346. Rol. 501 Sty. 61. 9 Ir. 1 Rol. 310. Par. 207. Salk 261. 2 Lev. 107. Rol. 442. Cro. 25. 205. Par 396. 1 Mod. 217.

In many of these cases the wife must be joined tho' there is no necessity for it for where the wife has been the meritorious cause of the action, she must be joined, but in no other case; this is the true line of distinction -

But in all cases where she is joined if the judgt is not executed during the life of the husband, it survives to the wife

Husband & Wife.

When the husband and wife must be joined as Defendants.

The rule is the same in this case as where they must be joined as plaintiffs, only the rule is reversed. for whereever the action would survive against the wife, after the husband death, both must be joined 1 Rol. 6.

Contracts made by the wife during coverture do not survive against her — 1 Rol. 340 2 Co Lit. 351. Dan 343. 1 Rol 3.51

There is a case in the books where there was a judgt. obtained by the wife & she married. a scire facias issued on that judgment & judgment obtained on it — the husband died & the wife married again. Note where there is an injury done to both, the husband must bring his action in his own name & join his wife for the injury done to her. there must therefore be two actions Cro. J. 358.

Where the house of the husband is broken & his wife beaten, he may state it in his declar. for breaking his house, tho there must be a seperate action for damages done to the wife —

How the wife may gain a Settlement.

This doctrine is very important as to various purposes. We shall only attend to it as it respects husband & wife.

The general rule is that the wife gains a settlement with her husband the moment she is married.

But if the husband has no settlement as if he is an alien for instance the settlement where they happen to reside.

See Burn's Justice, title "Poor"

In what manner the Law requires the marriage to be celebrated.

Every well regulated government has regulations on this subject. In some countries this depends upon customs or common Law.

In England and Connecticut this is regulated by Statute.

By the Eng. Stat of Geo. 2. if the marriage is not celebrated in a particular manner, it is void.

It has been a dispute of great magnitude, whether if there is no statute regulation & a person who has authority marries a couple, is the marriage good

This may be exemplified under the [illegible] of Connecticut, which declares that marriages shall be celebrated by or before Clergymen or Magistrates in their own county - Suppose they should go out of the county & marry here the marriage is as much void as if celebrated by any other person But is this marriage void? Lady R. Supposes not but the person who marries incurs the penalty of the Statute -

The idea of Clergymen having the power to marry originated in the days of superstition - The clergy then considered marriage as a sacrament and as an ordinance pour Leaven - but this idea was discarded at the time of the reformation in Eng.

The Statute of Connecticut declares when any person marries without a publishment of the banns, he shall pay a penalty of $70 - Now this is frequently done and none doubt the validity of the marriage -

Whenever there is a prohibitory statute inflicting no penalty, the offender may be punished at Com. Law. This is an important rule and always holds good -

9.
Husband & Wife.

Previous to this Statute of Geo. 2d, which precludes all questions of this kind, a marriage celebrated by clergymen other than Episcopal, who were the legal & only persons to marry were held good and valid.

1 Ld Ray. 64. 2 Geo. 371. 3 Salk 438.

During that period a marriage by a popish priest was held good.

Com. 545. 3 Ar. Rep. 200.

There is a case decisive of this question, which was decided in the Court of K.B. which may be found in 3 Salk 437 120.

The Statute of George 2d. declares that marriages not celebrated in the church &c. if not void. this excepts quakers &c. This Statute if observed strictly would be very inconvenient. But it is greatly evaded. for they do not require any proof. but if the parties have lived together and been reputed man and wife, this is considered sufficient.

There is no statute on the subject in the State of New York.

Divorces,

Husband & wife.

Are of two kinds, a vinculo matrimonii & a mensa & thoro - The former dissolves the marriage wholly, the latter only for certain purposes - Divorce a vinculo, a granted only for causes previous to the marriage & when granted renders the marriage void ab initio - -

A Divorce a mensa & thoro is granted only for supervenient causes.

The English Statute regulating this subject declares that all marriages within the Levitical degrees, or that are contrary to God's Law are void This left it uncertain what marriages were contrary to God's Law The County Laws determined that where there was a previous marriage both parties living, this was a marriage contrary to God's Law - And that incidently existing previous to the marriage was within the rule

Vaug. 32 3, 2 Ld. 240 Co Litt. 22 Hob. 101.

How near related are persons in the Levitical degrees? - All persons in the third degree are in the Levitical degree - -

100.

Husband & Wife

To find the mode of committing the degrees see distribution of real estates.

N.B. Precontract was formerly considered as within Gods Law, but this is taken away by Statute and precontract is now considered no ground of divorce or of annulling a subsequent marriage but this is a ground for an action for damages.

Moore 665. 6 Q.B. Cro. Car. 465.

A divorce a mensa does not affect the rights of the husband as to property except alimony is given to her support.

The causes for divorce a vinculo matrimonii being previous to the marriage, the consequence is that whenever the divorce takes place the marriage is void ab initio & the issue is bastardized.

1 Salk 121. 1 Ld. Raym. 486. 2 Salk. 271. 1 Mod. 102. 2 Lev. 33.

But until the divorce the issue are considered as legal.

By the Statute of N.Y. however the law in this respect is altered - the legitimacy of the children is in no way affected.

2 R.L. 93.

For the manner of effecting a divorce for adultery in N.Y. See Statute of N.Y.

Husband & Wife.

As to what persons have power to marry.

The Statute of N. C. allowed all persons to marry, not forbidden by Gods Law nor within the Levitical degrees. It remains for the Court to determine what Gods law forbid, and who were within the Levitical degrees.

Cro. E. 228. Moore. 907 Yaug. 310. 321 2 Ro. Abr. 101 2 Lev: 25

As to the distinctions of Law on this subject see authorities in the margin.

Fourteen in males & 12 in females is the age of consent; that is persons who have attained that age are capable of assenting to the marriage. But if the marriage is celebrated before the age of consent if the parties agree after they attain that age, it is good without a second celebration. But it is necessary that both assent for the contract is mutual.

1 Roll. 342

Co Litt. 33 79.

Husband & wife.

It is a general rule that the husband can do nothing to the prejudice of the wife - Yet there is one sett of cases where by his neglect she may be prejudiced, as where the covenants upon a condition & he performed by him & he refuses or neglects to perform it - In consequence of which she forfeits the penalty -

Co. Lit. 246.

When a wife has a seperate property & employs a person to do a particular act & engages to pay him, without the consent of the husband, her property is liable for the payment -

When a woman marries a man who has mortgaged his estate, it has been mentioned that the wife cannot be endowed of it - Yet if she redeems the mortgage, she will be endowed of ⅓ - & hold the whole until the heir will pay her two thirds of the redemption money - And if the heir redeems the, upon paying one third of the redemption money will have her dower -

Where the wife mortgages her estate with the husband, during coverture, on his death she will be considered a creditor for money to redeem the mortgage - This rule however applies only to mortgages for years, not in fee

Pow. mort. 321. Dee 2 atk. 520.

Can a feme covert devise property? Husband & wife.

It has been much litigated in Comm. whether she can devise real property. This question in England & N. Y. is well settled the Statute 1 W. & 1 Stat. of N.Y., absolutely bars her of that power. R.L.I. 170.

As to the question generally there is not much in the books.

Judge Reeve supposes the same principle applies in the case of devises as in contracts. When the wife can convey without injuring the marital rights of the husband she may do so.

Was there no Law on this subject, it would seem that she might, as there is no objection against it.

Judge R. thinks the wife can always devise when the marital rights of the husband are not affected. Therefore if she has notes & bonds on her death bed which the husband has not reduced to possession she may devise them, & this will pass unless the husband reduced them to possession before her death.

Since it has been the practice to give property to the sole & seperate

Husband & Wife.

use of the wife, it has been determined that a married woman may devise this property - and on this point the authorities are numerous - and the principle is as well established as any point of Law whatever.

The husband can have no power over this kind of property & the personal marital rights of the husband are effected.

See on this subject a excellent opinion by Judge R. at the end of this volume - where the subject is fully discussed & the authorities cited.

It is a principle that if there is any incapacity at the time the will is made, altho the incapacity is removed before the death - this will is not good -

Roug. 30 y. 101. 111. 4 Bol. 79. Mar. 60. Lindo. 173. 1 Bk Cas. 2 b. 2 & 3.

Femes covert may devise with the consent of her husband -

Ca book 2. b. 31. 32. Br. Dec. 84. 2 Ca. Ca. Eq. 176. 2 Vez. 190.

Lord Hardwk. says down the doctrine in the strongest terms, that a feme covert may dispose of her personal property -

Husband & Wife.

L: Thurlow lays down the doctrine that femes covert have the same power over their seperate property that femes sole have. Be: rep. 1. 2

2 beg. 75. 10 beg. 303. 318. 3 ath: 709.
Re: Ch. 205. 10. Ves. 126. 2 P.W. 316. 02.
1 ber: 245. 2 ber: 253. 1 Mod. 211. —
Moor rep: 340. 2 Anderson. 92.
1 Roll. 608. 912. —

Personal estate at Com Law, was the only estate that could be devised — 2 Brow. — Compton v Collinson — 2 A. BC: —

If feme covert devises her land & husband dies the will is not good because void ab initio — How. 344.

Feme covert may execute a power over real property by devise — 3 Atk. 693
Seperate property of the wife —
This doctrine was established by a Court of Chancery —
P. P. W. — 293. 1 Atk. 269 — 1 ibid. 390.
Bunb. 205 —

A suit respecting seperate property of the wife is usually brot by joining the husband for forms sake — 2 beg. 45.

But if the husband refuses to interfere or is concerned the wife may sue by prochein amie —

106.

Husband & wife.

The husband has no right to the property but the wife has absolute control over it - and may dispose of it by devise if personal property. but not if real being prevented by stat. of W. & Mo & stat. of N.Y. -

P.W. 393. A grant sometimes conveys seperate property to the wife tho' not so expressed -

Seperate property of the wife 1 Ch: 100. 16. 2 Atk: is liable to discharge her debts 79. 397. tho' her person cannot be taken.

A feme sole executing having wastes property, marries, her husband is liable for devastavit - And assets may be taken Bac. 293. n: in his hands, after the death of Equ. Ab: 10 the wife -

A feme covert who elopes with an adulterer is not liable on her contracts, neither is her husband - but the person who trusts her is without remedy - -

Parent and Child by Reeve.

Parent & Child.

Infants are persons under the age of twenty one years - and this is the same in both sexes. But there is an erroneous opinion abroad that females are of age, at an earlier period than males. True they are for many purposes, but not for the purpose of making contracts - By the civil law persons were minors until the age of twenty five -

Where infants are liable for their contracts -

It is a general rule that the contracts of infants are void - But this is considered for the benefit of the infant - Where it is not for his benefit therefore it will be only voidable - 1 Burr 55 2 Stra 930

If the infant can have the benefit of his privileges without setting aside the contract, it shall be a voidable contract, but if the infant cannot have the benefit of his privileges without considering it as

Parent & Child.

void, it shall be absolutely void. 1 Mod. 137. Latch. 10th Roll. 730.

There is some confusion in the books on this Subject. Judge Rawle only states his own opinion.

Where the contract is considered as void, it is considered for the benefit of the infant - but this does not extend to cases where there is fraud - for the infant is not in this case to shield himself from fraud. And he can make use of this contract for the purpose of avoiding the contract merely.

In what cases an infant can bind himself by contract.

It is laid down in the books that infants may bind themselves for necessaries - This is generally true - Necessaries are food, clothing physic &c but the rules the books are indefinite.

Lit. 172. a. 1. 5. 66. 6. 151. a. 361. T.R. 40.

Where an infant has no master or guardian, or when ill treated by them, he may bind himself

necessaries - This is considered for his benefit -

When the infant is out of the protection of the guardian or master, he may bind himself for necessaries, as when he is on a journey at a distance from the parent or guardian -

The infant is never bound to the extent of his contract, if the article is not worth so much - He is bound only to the extent of the real value of the thing purchased - He is bound only to the worth of the article to him.

These contracts are frequently covered with securities as bonds notes &c - Are they bound by these? There is no question but that they are bound by the contract but as to the bond or security - is this good? - If the security given is of such a nature as by the rules of law, it may be enquired into, as to consideration it is good -

But -

Parent & Child.

But if the bond is of such a nature as by the rules of Law, the consideration cannot be enquired into the bond is void.

In England you cannot enquire into the consideration of sealed instruments, therefore a minor is not bound by such a contract.

But in Connecticut, you can not enquire into the consideration of a note. they are considered the same as sealed instruments. It is laid down by the English writers that a minor may bind himself by a single bill. But these were formerly unsealed. But since they have become sealed instruments I. R. suppose they cannot be enquired into.

1 Ld. Ray: 184. 6. Mo. 247. 177. 3 Burr: 1426. 1 Lev. 186. 1 Burr: 686.

An infant is not considered as bound by an immoral contract but yet the consideration may be enquired into. The truth is formerly the consideration in this case could be enquired into, the rule would apply as mentioned.

Mo. E. 920. 90. 503. Coates 69. 1. N.P. 102.

Is an infant bound by Bond? Parent
Judge R. supposes he is not — Child.

If money is laid out for necessaries when borrowed by an infant is he bound? — Upon principle it seems that he might be, where the money is laid out for necessaries — But the authorities in courts of Law are directly the reverse — The Court of Chy however will compel the minor to fulfil the contract — 1 Salk. 272. 3 Atk. 389. 1 P. Wms. 55

It has been a question whether a minor husband is liable for the debts of an adult wife & determined that he was & likewise for the necessaries of the wife.

When the minor is ex^r. if the bond is lost & the minor gives a discharge he is bound by it — Co. Litt. 171. 315 — 3 Bac. Abr. 601. 1 Bl. Rep. 57

It is generally true that where a minor contracts with an adult, the adult cannot rescind the contract unless absolutely void — But the adult cannot say that the minor may rescind the contracts. This is not good plea — 1 Mod. 2. 1 Vent. 5. 2 Sid. 20.

Parent & Child

Can a minor rescind the Contract & retain the consideration?

Judge R. says this is a questio vexata. According to the general principle it seems he cannot. But according to the idea of rescinding it does not seem that any thing more is meant than that the contract shall remain in statu quo, or shall be put in the same state as it was before made.

A minor shall not make use of his privilege for the purposes of fraud. 2 Mansfield says he shall make use of it only as a shield, & not as an offensive weapon.

Bac. 140. 1 Show. 171. 3 Pow. 30. Rep. Ca. 162 1 Vent 203.

Judge R. supposes indebitatus assumpsit would lie in this case. for wherever a man's money is taken from him by any wrong act, indebitatus assumpsit will lie.

But in this case the action must be founded on the wrong act & not on the contract. Wherever property of any kind is taken by any wrong act & converted into money this action lies. In authorities of former rules

Parent & Child.

In case of necessaries, to charge the infant they must be actually so — tho they may appear to be, yet if they are not, the minor is not bound — as if a minor entering on a farm and wants a yoke of oxen, which are necessary to carry on his business, yet he is not bound by such a contract — And the principle applies to every such case of tradesmen or any other person who wishes to establish himself in business —

7 Co 9: 494
Sta: 1603

Among the necessaries of an infant are food, physic washing lodging & instruction —

Bac: 361,
5 20. Ep: 16
3 Bac: 17:
1 Burr: 8 56
Latch 166
2 atk. 3
Co. E. 503
2 Stra: 990

The authorities in the margin show on what principle the minor is bound —

When a minor acknowledges a debt after he becomes of age, he is bound by the contract, and in this case the action is founded on the original undertaking and not on the subsequent agreement — And on a plea of minority the Plff states the agreement in a special replication

2 Stra: 124
Ep: 90. 17
Burr: 107
1 T. R. C: 46

Parent & Child.

When a minors contract is void & when voidable?

This is an intricate subject, of importance as it respects third persons & attended with many difficulties -

These contracts are those which are not for necessaries - There is much confusion in the books on on this subject - But as a general rule the contracts of infants are voidable - If the contract is strictly executory, it is always considered as voidable -

When the contract is executed the general rule is that, if the minor can have the full benefit of his privilege by considering the contract as voidable, it shall be so considered. If he cannot have the full benefit of his privilege it will be void - This rule however is not universal -

2 Burr. 1006. 1 Mod. 25.

It is a rule in the books that where there is a sale by a minor without a manual delivery, it is void. It is not necessary in a sale with an adult, as of personal property -

Parent
Child.

contracts respecting real property
there must be a delivery - But
if there is a manual delivery
by the infant it is voidable
only, if he can have the full
benefit of his privilege -

It is hinted in the books that
executory contracts respecting
real property are void; but no
authority is found to support it.
It is laid down in the books that a
contract which has no semblance
of benefit to the infant is void -
This expression is not good. It is not
strictly true -

1 Mod. 137.
1 Vent. 51.
1 Pow. Con. 30
Sira: 937
Salk: 10.
Bun: 1794
Co C: 5 & 6
2 Mod. 310
1 Ab. b. 369
3 Bac: Ab. 10
1 Bl. rep: 57

Is a Minor bound void or
voidable?

This is considered as unsettled by
many - It is said by many to be
an executed contract. Judge Rowe
thinks it executory - and that
the error in this case originated
from this that a bond for necessa-
ries is void - As decided in Co. Eliz:
The reason why the bond in this
case is void is that the considera-
tion cannot be enquired into -
Therefore the infant has not
the full benefit of his privilege -

110.

Parent
Phil.

It appears in this case from the authorities that the contract is
the the bond is void - And in the
case indebitatus assumpsit will
lie to recover the debt on the
original contract -

2 Co: 920.
Ep. 164.
3 Lit. 172
Sum: 1805.
Rol. 729.
Moore 679.
Hut. 106.

As an argument that bonds
voidable only, it is a rule of law
that what was originally bad
cannot be made good by any
act but what
be made good by a promise
the infant after he becomes
of age; whereas an instrument
that is void can never be made
good - one voidable only can

Rol. 720.
B.N.P. 69.
3 Co. 85.
2 Hut. 203.
Sid. 690.
Atk. 354.

Contracts that are void
be taken advantage of by any
different person - but one that
voidable can be made only
the person himself or his repre-
sentatives -

Sid: 930.
Bac: 142.
Rand. 301.
Cath: 436.
T.R. 603.
600. - 5th
Dum. 643.

Where a minor conveys, judgt. in Ejt.
it will on application to the Court
set aside. Here we have no such fact
Therefore the conveyance or indent. of
By the Eng. law a minor must avoid
conveyance of real property during minority
or never. This is a mere technical rule
does not exist in any part of the U. States

Infants' liability to punishment.

Parents Childs.

Under the age of seven years the law presumes the infant incapable of committing crimes - and this presumption cannot be rebutted. Co. Lit. 247. 1 Haw. 62

Between the age of 7. & 14 - the presumption is the same, but it may be rebutted & the maxim of law is Malitia supplet aetatem - 1 Haw. 1. 2. 4 Bl. #2

When a statute creats a greater punishment than the com: Law, if infants are not named in the Statute they are not liable under it - but may be punished under the common law - 1 Salk. 376 Plow. 264 3 Mod. 310 Co. Ad. 179 3 Bac. Ab. 691. Co. Lit. 357 1 Haw. 147

The infants liability for the commission of wrongs civiliter solitione in this case is not easy to say so as to render a person liable - therefore a madman or an infant is liable civiliter. 1 Haw. 3. 9. Vin. 391

It has been a question whether an infant is liable for a fraud civiliter - (for there is no question but they are liable criminaliter, if the Crime would have been indictable in an adult) - The authorities that he is not liable, but

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Parent & Child.

by a divided court - Judge R. does not think the law founded on principle - but should have been otherwise -

1 Sid. 258. 1 Lev. 169. 12 Mod. 396. 1 Ves: Ch. 350.

It is said that it is laid down in the books that an infant is not liable for slander until 17 years of age. This is said to be the law in Nov. but it is not so laid down in Nov. & it is incorrect -

Roy. Ap. 129. 3 Bac: 132.

There are many other cases where minors are of age for certain purposes - Males are of age to choose guardians at 14 & females at 12 - They may devise their personal property at 17 years of age by the Statute

Law on Will 1 P. =

2 Lit. 89. 2 Ves: Ch. 316. 2 Ves: 104.

= of Connecticut at 14 by Com: Law

A minor's settlement on his intended wife, is held good -

1 Bow: C. 42. 1 Ves: Ch. 152. 3 Atk. 56.

A minor can officiate as Executor at 17 - and may make contracts respecting his executorship But he cannot officiate as administrator until of the full age of 21 years

The reason given by the English writers, is, that an infant cannot give bonds - But if this reason be true an infant cannot be an Executor Com^r - for he must give bonds - J. R. thinks there is no reason in the

5 Co: 28:9. 3 Rep. 121. Cas: 446. Ray. 310. 1 Sal: 39.

Parent Child.

The confession of an infant cannot be given in evidence against him in criminal cases - Cro. Jac. 456.

As to the grants of infants, see 12 Vin. 536. 9 Mod. 30. 1 Bl: Ch. 355.

It has been a question, if a settlement is made on a minor wife whether it is a purchase of her choses in action as it is in cases of adults -

All the decisions in Ch. have been that there is no difference in this respect between infants and adults - 5 Bl. Pa: ca. 270

If a minor marries an adult who had articles to convey, the minor is liable to fulfil the covenant - 2 Bl: 515.

If a minor marries an adult he is liable for her contracts -

A minors debts must be paid if he devises that they shall be. 3 Bac. 146.

If a minor is trustee he is liable to fulfil his trust, as an adult & is compellable in Ch. by his guardian to fulfil it. 1 R. L. 210.

If a parent articles to convey land and dies before the conveyance the heir is compellable to convey in Ch.

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Parent
Child.

If a minor in any of these ca
does those acts which he would
compelled to do in chancery, th
good and binding unless they w
and against his interest or w
reasonable.

There are a great variety
cases where minors are bou
by their acts, not mentioned

How minors must sue
be sued.

They are sued by guardian
in this case the declaration
in common form, stating some
generally at the close that h
sues by guardian or the gua
dian is cited. If there is no
guardian the court appoints

If no one could be found to
=cept the appointment, the mi
would not be compelled to answ
& judgment could not go again
him.

If a minor sues he must
=dinarily sue by guardian
there are cases where he ma
sue by prochein amie. If
goes against the minor, the ex. is
against him & upon non est returned, a
new one issues against the guardia

Where an infant brings a suit the rule is laid down that he must sue by guardian or prochein amie. This prochein amie is any person who will undertake the suit and is also next friend -

By the Common Law a minor could sue only by guardian - The liberty to sue by prochein amie is granted by Statute -

The first case where he can sue by prochein amie is where he is absent from the guardian - The second where the guardian will not suffer his own name to be used - but gives his consent that a suit may be brot - 3d - Where the guardian is sued by the minor 4th Where the infant has no guardian -

3 Bac: 149. Co. Lit. 640. Pa 295. Bat. 92

Liability of Guardian for costs -

This is different in Com. from the Com: Law of Engd. tho they have no Statute - It is a com: law of their own -

In Engd: the guardian gives no bond & the execution issues gainst the guardian & the minor is not liable at all - But in Com. he gives no bond & the minor is liable for

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Parent & Child.

costs if he has property - if not the guardian -
Barnes notes 2 N. 3 Bac: Abr. 660. 666. Gil: Law Ev: 87. Co. Lit. 33. 2 Kw. 291. Stra: 700 -

When the infant is Def.t judg.
Stra 127. is entered against him for costs
The infant must be sued by
Co Lit. 135. guardian or judg.t must issue
Co Lit. 604 be guardian -
The infant may be sued tho
there is no guardian, but proceedings must be stayed until the Court appoints one and
if there is a guardian & he is
not cited, this will not abate
the suit, but time will be
granted that he may defend.

According to the Law of Conn.t
where judg.t issues against a
minor & an adult, if judg.t
is reversed as to the minor, it
Co Lit 209. 2 Bac: Abr. 220 - 3 T.R. 435 good as to the adult. if the cause
is for joint tort - In the english
law the rule is different -

As to the Law of Connecticut See
Kirby 116.

1 Salk: 44. 6 Mod. 225. 235. Ray. 400. 1 Lev. 96. Non feasance subjects a minor
to damages for the neglect in
civil cases -

Parent Child.

If prochein amie or guardian files a bill in chy in favor of an infant & a decree is made, the infant is bound unless he can show after he comes of age, that there was fraud or neglience in the guardian. 1 P.W. 514. 3 Atk. 626

Infants are allowed six months after they come of age to impeach or set aside a decree in chancery except in case where the decree is against him as trustee. 2 P.C.C. 401. 9 Mod. 12. 2 Atk. 529.

A jointure made by an infant on his wife of real property is good. 1 P.W. 229. Stra. 664

Law respecting infants unborn.

There is much old law on this subject which has been exploded.

If a woman is beat so that the infant dies it is not murder but a great misdemeanor. But if the child is born and then dies in consequence of the wound or beating it is murder. Judge Reeve supposes this expression too general.

1 Haw. P.C. 120.

126. The great question formerly
Parent & Child. respecting rights of infants in their
was whether they were in esse
It seems to be the idea of the
Dum. 432. 3 Mod. 9. 1 Lev. 135. 1 Ventr. 314. 306. Car. 309. english writers at present that
they are not -
An infant in ventre sa mere
is entitled to a distributive
share of the personal property
under the Statute of distribu-
tions -
The english idea respecting the
at present is that the estate vests
in the heir living & upon the birth
of the child vests in the child
born - By the civil law a un-
born infant is considered in esse
By Statute of New York "all posthumous children shall in all cases
1 R. L. 46. whatsoever inherit in like manner
as if they were born in the life
of their respective fathers -
A parent may appoint a
Salk 72. 9. Mod. 637. Car. 309. 5 T. R. 50. guardian by will for his child
until they die fourteen years of
age when they may choose for
themselves -
In Ferne 429. the doctrine is
Ferne 429. fixed & all the authorities cited -

By the Com: law in certain cases, an infant may hold offices - but then must be ministerial - A minor can never hold a judicial office In Engd certain offices are hereditary - in these cases the minor can officiate -

Parent & Child.

A minor cannot be an attorney for he ought to be liable for misfeasance - But in this case there can be no remedy to the clients for misconduct, as courts would not subject minors for such neglects of misfeasance -

3 Bac 126. Cro E. 336. 2 Dall. 189. 3 Mod. 122.

In the United States there is not much use for the law respecting offices - as here our offices are not hereditary, and there are few ministerial offices as Park Keepers &c -

Parent & Child.

Of the Privileges of Infants.

Co Lit. 246. 1 Vent. 199. 2 Lev. 233. Cartth 33.

Where there is a penalty for the non performance of an act and the minor is not bound by the forfeiture.

But in case of a pledge, where the thing itself is forfeited, an infant is as much bound as an adult.

1 Lev. 31. 3 Bac. 515.

It was formerly a question whether minors are exempted from the Statute of limitations. It was finally determined they were not.

R2. 562.

In consequence of this minors are commonly exempted by Statutes of Limitations.

A legacy given to a infant draws interest at the expiration of a year from the death of the testator tho not demanded. But in case of an adult the rule is that the legacy will not bear interest until demanded.

Legitimacy & illegitimacy of Children.

This doctrine has undergone a great revolution in the english law in modern times.

A Legitimate child is said to be one born in lawful wedlock.

By the civil law a child might be legitimate altho not born in lawful wedlock; if the parties afterwards married, this legitimatized the issue born before marriage. But the english law is different from principles of policy. It is not a correct definition or not broad enough to say a legitimate is one born in lawful wedlock - as a child born out of lawful wedlock, may be legitimate, as where the husband dies.

An illegitimate child is one both born and begotten out of lawful matrimony.

But a child born in lawful wedlock may be illegitimate

12 9.
Parent & Child.

According to the old law this could rarely happen, as formerly all proof of the non access of the husband was excluded

Co. Lit. 123. 102. 122. Co. Lit. 541. 2 Stra. 940. 1076. Raym. 395 Salk 122. 1 Mod. 419. 1 Will. 275. 3 T.R. 356. 2 Ld. 404.

and all presumption of inability except for want of age. According to the modern law on this subject any proof may be admitted to shew the non access of the husband or his inbecility.

7 T.R. 35. Peake 25. 2 Ld. 402. 3 T.R. 112.

In case of seperation of husband & wife the presumption is that it is the child of the husband. Judge Reeve supposes this presumption is not well founded.

Dan 9. Dan 912.

The time of gestation as fixed by Law is nine months & ten days. But this may be varied according to the circumstances of the case & the opinion of Physicians.

2 Lit. R. 123.

In certain cases the child may choose his father.

An illegitimate child is subject to some disabilities. He cannot inherit an estate. Neither can any other person from him, except

his children & heirs of his body. 130.
But having acquired a name Parent & Child.
by reputation, he may take
by purchase - but he cannot
take under the term issue or child
but his name must be mentioned
But if there was no other child
in one case it was decided that Moor 60. 1 Sid. 194. Co E: 510 Co Lit. 3. b. Co: 65.
he might - the current of au-
thorities however are opposed.

There is one case in England
where a bastard may inherit
or become legitimatized - This
is in case of a bastard eigne and
a subsequent puisne - where the
parties marry after the child
is born and have another child 7 Co. 44. 3 Bac: 120
and the bastard as being the
oldest enters on the estate.

Settlement of Bastards.

In case of legitimate persons
their settlement is that of the
parents - But the settlement of
a bastard is where it is born, Salk. 121. 4. 27.
according to the english law, un-
less there is fraud practiced -

Parent & Child.

But in Con^n the Settlement of the mother is the Settlement of the child -

The Settlement of legitimate children as before observed is where the Settlement of the father is - It makes no difference when the children are, if they have gained no Settlement by their own act they are with the father -

a person can have but one Settlement -

If the father has no Settlement the mother has, the Settlement of the mother is the Settlement of the child - this may happen in case of foreigners -

When neither the father nor mother have a Settlement the place where the child is born is his Settlement - -

The whole doctrine of Settlements you may find in Burn's Justice under the head of Poor - Children are always heirs to their parents, in exclusion of all other persons -

liability of Infants for their contracts in Chancery -

Parent. Child.

A court of Ch.y have in some instances enforced contracts of infants which were not good at Law - The case in Atk: is put to exemplify the rule but I. R. this has not much relation to it. 1 Atk. 489.

There has been a great question whether a minor is liable for a contract of marriage after he is of age to marry - One case has occurred in Eng. & the point which recognizes the idea that the minor is not bound - But Judge R. supposes that the infant being of age to contract ought to be bound by it & therefore liable - 5 Vin: 987.

Infant Def.t is bound to pay cost in Ch.y as much as if he was Def.t 2 D. M. 519

An infant trustee is bound - 1 Ves. 343.

And a minor may be foreclosed 2 Ves. 337.

There is one case in Ch.y which seems to be rather different from the general principles of the Law 1 Ves. 252

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Parent & Child.

The father is nat. guardian of the child - This term has been applied to the father because he is guardian of the minors property when they have any - If the father stands upon the same principle as other guardians & liable to be removed if he mismanages and he must account to the child - In case of an ordinary guardian, he has an allowance for bringing up the ward - But a parent is bound to take care of the child & therefore cannot charge the child -

2 Bent. 353. 3 Ath. 399. 1 Ath. 409. 1 Bro. 255. or 295.

But there is one exception where a legacy is given to a child & the parent gives him an education, when he would not have been otherwise able in this case he may take the legacy & charge the child -

But where the father is able in circumstances to educate his child, he cannot charge the child or his property in any case -

2 P. Wms. 22. Post. 152

Parent & Child.

Infants are allowed six months after they come of age to impeach or set aside a decree in Chancy except when the decree is against him as trustee - 2 Ath 529

A minor who has been dispeyed of his property, when he becomes of age may treat the dispeyor as a wrong doer or compel him to account for the rents & profits -

The duties of a parent & in many cases the same as master and infant & will there be considered -

---

How is the father known?

This must be disclosed by the mother upon oath - tho this is not conclusive, if it can be rebutted by other testimony - If the person who has been charged clears himself, this woman can never be admitted to shew that another person was the father.

Parent & Child.

The woman must be put upon oath in the time of her travail & must be uniform & constant in her accusation. The father together with the mother are liable to support the child & for this purpose a suit may be instituted against the father in the form of a criminal prosecution & recover the money for the support of the child. If the child dies the father is not liable.

It has been a great question whether the deposition of the woman can be admitted in this case as being a criminal prosecution. The Courts have dispensed with it in certain cases when the person of the woman could not be procured, as if she were sick but in no other case has it been dispensed with. It is in fact a civil suit though form criminal.

Liability of Parents to support their children -

Parents are liable to support their minor children by the com. law - In Connecticut they are liable to support indigent children -

Children are likewise bound to support their parents, & in this according to their ability -

There is one singular exception to the rule that parents are liable to support their children - a son in law is not liable to support parents in law - nor the poor children of the mother or children in law - 2 Ray. 1454 4. D&E. 119.

Note - When a bastard child is born, or like to be born if the woman neglects to bring the suit against the father, or to disclose who he is, the select men of the town may compel her to disclose & bring a suit against the father themselves -

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Parent & Child.

There is the same privilege between parent & child in justification of assault & battery in defence of each other, as between husband & wife. The parent may defend the child when it is lawful for the child to defend himself & so vice versa.

Where the parents are liable for the torts of his child.

He is liable for the torts of his child, where a master is liable for the torts of the servant; it is not upon the principle of his being a father, but that the child is his servant, that he is liable.

Where the child is pursuing the business of his father & does a wrong act, the father is liable. But when the child is not in pursuit of his father's business, the father is not liable, but the child is liable in all cases.

And the person who does a wrong act is always liable except in the relation of husband & wife Here in certain cases the wife is excused under the doctrine of coercion - this is the only exception in the law -

Parent & Child.

Where the event could not be prevented by ordinary human foresight no person is liable -

Bl. ab 892.

Where the parent is bound for the contracts of the Child -

In case of necessaries both parent & child are bound by the contract -

Another principle upon which the parent is bound is entirely on a different ground from the former & is on the principle that the child is the agent of the parent - When the child is expressly empowered to contract it is considered strictly the contract of the parent & he is bound -

2d. where he has a gen. licence to contract - And this may be proved by the conduct of the parent - as when he ratifies the contracts of the child - in this case if the child contracts again, the parent is bound by his former contract he is presumed to assent -

3. When there is no ways or assent yet if the father uses the thing afterwards, it will be presumed a subsequent assent -

Liability of Parents to educate their children -

This in a great degree is left to the discretion of the Parent But in England & in the States of N. Y. & Connecticut & others, poor children may be bound out to a trade by the Justices & parish officers & By a Statute can - Children must be taught to read & the laws respecting Capital Offences - & an orthodox Catechism

Parent & Child.

The right of Parents to an action for injuries done to the Child.

One case is where the parent brings an action for debauching a daughter. this is found on the loss of service the father sustains & the expence which accrues to him thereby.

Tho the form is loss of service the rule of damages is the disgrace dishonor & wounded feelings.

There is one case where a new principle is introduced. this is in case of the Seduction of the daughter. This is in form an action for loss of service per quod servitium amisit.

But the real ground is the disgrace & indignity offered to them. This idea did not exist at com. law, but is of modern introduction. In this case the daughter is admitted a witness & the rule of damages depends upon the character of the Plaintiff.

2 Will 10.
1 D & E. 166
2 D & E. 160.
2 Burr. 1078.
2 Ray. 1032.

Parent & Child.

Power of the parent over the person of the child.

The parent has power to correct the child reasonably. The only question is what is reasonable correction. This must be left to the discretion of the jury a great measure. The parent is liable wherever a person would be liable in a judicial capacity for his acts. If there appears an evil or wicked intent he will be liable.

If the act is done malo animo it is unreasonable correction. 1 Haw. 37. 73. 122. 130. The instrument in this case must be taken into consideration.

In some cases when the child dies of the wound it is manslaughter & may be murder.

Guardian & Ward.

A guardian is a temporary ru
ler or one who stands in loco
parentis -

A ward is a minor or per
son under the age of 21. years.

According to the english law
the guardian is over both the
person & property of the ward.

At Com. Law there were several
species of guardianship - viz.
Guardian in chivalry; by
nature; in socage; & by nurture.

1st. Guardian in chivalry was
where there was knight service.
This guardianship existed over
males until twenty one &
females until sixteen, unless
married before that period.

The guardian was intitled & able 2 Bl. Co. 87. 67. Pow. Mort. 88 note 4.
the profits of the wards estate, and
& the body of the ward.

2. Guardianship by nature was 3 Co: 38 A.
supposed & the custody of the father 6 Co: 2 20. Com. 415.
& mother according to the ancient idea 1 N.C. Com. 461.

Guardian & Ward

But this idea has of late been repudiated - for any ancestor may be guardian by nature to his heir apparent. Among ancestors of equal degree, priority of succession determines the right -

3 Com. 415. 1 Inst. 88. a.

The father has the right in the first place -

Co. Lit. 88. a. 12.

This species of guardianship extends only to the person & not to the estate - tho' he may be guardian of the estate in another capacity -

1 Inst. 84. a. 88. a. n. 12. Cath. 306.

It extends only to the heir apparent, tho' he may be guardian to the minor children in another capacity -

But in the State of N. Y. & Conn. this distinction does not exist for all the children are heirs apparent all equally inheritable -

1 Inst. 84. note 14. 88. note 12.

In England the father may by testament thus point out a guardian for his heir by Stat. 12. Car 2. This guardian is superior to all others -

7 Co. 30. a. 5 Mod. 223. 1 Inst. 88. a.

Guardian in chivalry was superior to guardian by nature except the father -

3. Guardian in Socage arises from
time to descent & takes place
when an infant under 14 years of age
becomes seized of socage lands -
This species belongs to the nearest
of the relations of the Union who
cannot possibly inherit the estate
nearness of kindred in this case
is considered & not nearness of blood.
In case of equal degree priority of
possession decides the right.
Guardian in Socage may lease
the lands of the ward & sue
for the rents -
He has also the custody of the
person if there is no superior
guardian -
Guardianship in Socage exists
only till the ward is 14 years old.
And the guardian must account
for all the profits of the ward's
estate -
4th Guardianship by nature, ex
tends to all the children & ter-
minates at the age of 14 years -
& is exercised only by parents -

Guardian
4th sort

1 Bl. Com 461.
2 Ans. 176.
1 Inst. 87 b
8 N. N. 13.

1 Inst. N. N. A.
note 13.

2 Bac: Abr 603
4. Com Dig 413.
2 Rol. 41.
2 Ld. Ken. 122

1 Rol. 40.
Hut. 17.
1 Inst. 87. b
note 13 -

2 Bac: Abr 607.

3 Com. 416
3 Co: 38.
1 Inst. 84.
8 N. N. 12.
2 Atk. 14

There are all the species
of guardt known at Com. Law -

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Guardian & Ward.

There are several kinds of guardianships which did not exist at common law.

3 Con: 418. 1 Inst. Eq. B. 1 Eq. N. 16.

1st. Guardianship by the election of the infant. This is of modern use & takes place when there is no other.

1 Vez. 375. 1 Inst. Eq. 1 N. 16.

Two modes of election have been sanctioned. Before Court & by deed.

1 Bl. Com 463. 1 Inst. Eq. 1 n. 16.

It seems to be settled that the infant may choose a guardian at 14 years if not before.

2d. Another species unknown at the old com law. is that of the appointment by the Chancellor which has existed chiefly about one hundred years.

Bl. Com: 544. Fitzh. C. R. 172.

There are appointed when there is no proper guardian for the infant. Or where

2 Bro: 679. 1 Ves. Con: 463. 10 Ves: 403. 1 Eq. Ca. Ab: 280. 9 Ves Chy 106. 8 Mod. 214

an improper guardian & this rule extends to all guardians who. conduct improperly.

The Chancellor may appoint a temporary guardian

3. Another species of guardian - 3 Com 418.
this not provided for by Statute 14 Wen 176
but strictly one at Com-Law 2 Va 679 -
is that by the ecclesiastical 3 Atk 631.
Courts - Mus: 131.
4th. The last kind of guardian 132 A & B -
which is in use more or less
in most of the U.S. is a guardian
this ad litem - which is one 1 Bos & Pul. 89. N.R.
for a particular suit - 195. B.
This guardian is appointed 9 Johns Cons 42
pro re nata by any court 2 Lev. 138.
before whom a cause is brot. 5 Co: 53. B.
But is never appointed for
an infant Plaintiff.

Law of Connecticut and
New York

Under our Law there is no
such thing as guardian in Chi
valry - in Cottage, nor by nur
ture - Nor is Con - by testament
In N. Y. Guardians are appoin R.L. 101.
ted by deed or will - See Stat.
for manner of appointment &
powers of guardians -

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Guardian & Ward.

In Con. there are only 1st Guardian by nature. 2d by appointment of the Co. of Probate. 3d. ad litem appointed by the court pro re nata.

R.L.220.

In N.Y. Judge of Probate & Surrogates appoint guard. for minors when a sale real estate is decreed.

R.L.325.

The natural guardian is guardian of the property as well as the person of the child till the age of 21 years unless the father is removed as he may be for mis conduct or death.

As to the mother being guardian after the death of the husband - See Root 192 Stat. Con. 227.

It has been decided that the mother is guardian & right of the female children till 12 yrs of age but not of the male children.

Root 2.320

Liability of Guardians to account.

Guardian & Ward

All guardians, except in Chy only are liable to account for the profits of the ward's estate. 6 Lit. Op. Note 9.

The usual remedy for the ward is to file a bill in Chy. The action of a/c will lie, but is not so extensively resorted to. 2 Con: 231. 1 Mut. Op. Note 9. 1 Mich. Con: 463

In Con: the usual remedy is account for there the party may be put upon oath & this answers all the purposes of the court of Chancery.

If the wards estate is under go of being wasted by the guardian he may be called to account, or removed for misconduct. 2 Bac 679 2 Mod. 177 1 Eq. Ca: Ab 177. 216

By stat. of N.Y. Guardians are liable to treble damages for waste sale or destruction of the inheritance of the ward. RL. 55.

Guardian & Ward.

It is clear that in England a Chancellor may remove guardian for mis conduct 12 W. 703. 1 Bl. Com. 463. Salk. 1 Ves. Ch. 77. 1 Bro. 160.

3 Atk. 399. 1 Ves. 234. 1 Br. Ch. 307. 1 Bro. 250.

No guardian except parents are bound to support their wards out of their own estate.

In the latter case the parent is not obliged to support the child as guardian but as parent.

A widow having married is not bound to support her former children.

This rule is founded in policy rather than principle. For if she was bound the consequence would be that the second husband would be virtually bound to support children. This it is supposed would excite domestic discord & for this reason the rule is thus founded.

1 Br. Ch. 260. 1 Bro. 160. 2 Vent. 363 Contra.

If any thing more than ordinary is done for the child for his benefit, it is said that the childs estate may be taken by the parent. But this rule is denied. There can be no definite rule upon this subject. It will depend upon the circumstances of the case. If the father is abundantly able to provide for the child his estate cannot be taken. Guardian and ward

Ante 133.
2 Kent. 353.
2 Vez. 137.
2 Con. 230
3 Ath. 399.
Bumbal 136

By the Statute of N.Y. Court may appoint guardians for minors to effect a partition who must give security for the faithful discharge of this duty. The guardian have full power to effect the partition & their acts bind the minor. & are as valid as if done by the minor when of full age. This is also the case in Connecticut by Statute.

R 2.545.

Stat Co. 250

Guardian & Ward.

It is said that the guardian or next friend in England can bind the infant by partition but this seems to be an unreasonable rule as the infant may bind himself —

1 Bun: 1001. 2 Bun: 804

If the ward outlive the ancestor more than is due, the ward and not the guardian has the benefit of the discovery.

2 Co.: 230. 2 Bac: 807. 1 Chu: 95.

For the guardian in this case acts as bailiff to the ward.

By that. of K.G. Guardian holding over after the determination of the life of the infant without the consent of such heir declared trespass. And ward intitled to recover the full value of the profits received during such wrongful possession.

Rd. 115.

2 Ca. ab. 2 Bac. 2 Bac. 807.

The guardian is bound to the utmost for the ward's money unless he can make it appear that could not obtain it on good security —

2 Veg. 629.

The guardian has no right to the money of the ward in his

Guardian & Ward.

But if he does the ward may take either at his election on coming of age — 1 Ves. 435-6. 2 Com. 231.

It is the duty of the guardian to pay the wards debts out of the personal fund & the guardian cannot pay them out of his own money & then claim interest on the money. 1 Ch. ca. 108 67.

But this rule needs much qualification, for in certain cases the guardian may be justified in doing it. 2 P.W. 279

If the guardian vest the money in land & the ward dies before election, the executor shall have the money & the heir cannot claim the land. 1 Ver. 433 For the right of election 435. is personal & dies with the ward.

In general the guardian in accounting for the ward money must pay principle & interest. 2 Com. 231.

But if the money is directed to be laid out in a particular way & he disposes of it in a profitable speculation, the ward has his election. 1 Ves. 629

Marriage of Wards.

In England the Court of Chancery prohibit marriage when there is no consent of the guardian, & even with the consent, if the marriage is unequal the Court will prohibit it & it is a contempt to proceed & will be punished as such. In this case all persons concerned in promoting the marriage may be punished.

2 P.W. 111. 362. 1 Vez. 160.

The guardianship of females terminates with their marriage. But this is not the case with males.

If the guardianship of females continued after marriage, the guardian might claim the person of the wife & retain her property.

1 Vez. 91. 2 Vez. 160.

End of Guardian & Ward.

Master & Servant.

A servant is a person who is put to the personal authority & another.

A Master is one who exercises that authority - The authority must be personal subjection & civil authority will not constitute a servant - The authority of the master is generally but not universally derived by compact -

At Com. law there are four kinds of servants; in Con^t. six - 1) -

1. Slaves, 2^d. Apprentices - 3^d Menial servants; 4^th. Day laborers 5^th. Agents of any kind, as brokers factors &c^a 6^th. Debtors assigned in favor -

1 Bl. Com 423 to 1 Woodd. 464 Salk: 666. Stat. Co 64

The last kind does not exist in New York the rest do -

I. Of Slaves - It has been doubted by many professional men whether Slavery has ever been legitimately in Connecticut. If it has, it depends either upon natural Law Com law of England or local custom -

Master
Jones

By the natural law accord-
ing to modern opinions Slavery is
not justifiable. It is said that
when a person has a right to kill
he may have a right to the per-
1 Bl. Com. 423 2 Burlamaqui
c. 2. 2 2 But the master has no right to
kill unless in case of necessity.
2. It is said that Slavery may
exist by compact. But absolute
Slavery implies a right to de-
prive of life, which a person has
1 Bl. Com. 423 no right to do. There is no
consideration for such contract.
If one cannot become a Slave
by either of these modes, it fol-
lows that it cannot exist by
birth, because this presupposes
Slavery.
Salk 666. Lofft. 1. By the Common Law, there
is no doubt, Slavery does not
exist, that is absolute Slavery.
The rule in England is that
1 Hut. 79 B. note. a foreign Slave by landing in
that country becomes ipso facto
free.
There were indeed in England a few
Slaves called villeins but this was
not absolute Slavery —
2 Bl. Com 96. Lofft. R. Hum. v. Somer-

Master & Servant.

As to the Local custom. Mr. Goold supposes there is no doubt but that a qualified slavery is legalized. This is inferable from a number of the statutes, particularly that providing for its abolition.

There is no judicial opinion directly on this point; but the Sup. Court of Comm. have manifested opinions favoring the idea of slavery.

It has been decided that trover will not lie to recover a Slave but an action on the case will. 1 Salk. 66.

Absolute slavery has never existed in the State of Connecticut for the master has never had power over the life of his slave & the slave may hold property & sue by procheine ami. It has been decided by the Sup. Court of Con. that the marriage of a slave with the consent of the master emancipates the slave.

This is probably analagous to the case of a servant and agreeable in principle. 3 T.R. 356. 2 H. Bl. 511. 2 Bl. Com. 93.

Vid. R.L. N.Y. 612.

Master & Servant. III. Apprentices.

This species of servants is derived from the french word apprendre & learn.

1 Bl. Co. 462

Apprentices are usually bound to the professors of some mechanical art. but they may be otherwise.

An apprentice can be bound only by deed & this was the case at Common Law. This is the only case where writing was required at Com. Law.

6 Mod. 1802
L. Ray 1117.
Salk 66.
2 Ves. 64.
492.
1 T.R. 379.

If the indenture is defective it cannot be construed into a less time as a year &c.

1 Burr. 57.
3 Bac. 546.
1 T.R. 379.

It was formerly held that an apprentice could not be bound without this word. but this case has been overruled.

Any other servant than an apprentice may be retained by parol.

R. 2. 107.

In England & N. Y. the children of paupers may be bound out by the overseers of the Poor & Justices of the Peace.

Stat. Co. 60. 343.

In Conn. the Select men with the advice of justices may bind out

all servants except apprentices
are allowed wages - These are
settled in different ways in Eng.
& Com. Wages are usually set
tled by the contract of parties -

Master & Servant. Comy 47. 1 M. Com. 420

When it is said that apprentices
are not allowed wages - nothing
more is meant than that the
law does not imply any promise
on the part of the master to pay.
But if there is an express con
tract he will be liable -

3 D.T.R. 379.

In England minors may bind
themselves (by stat.) by indentures
and this is good against the master
but the minor may avoid the deed
at any time he pleases - The in
denture will not be bound by his
indentures, but as long as the con
tract continues the minor is appren
tice de facto & enjoys all the rights
of apprentices. But if the father join
he is liable on his covenants.
In Com. there is no stat. & the
minor is not bound at all.
In N.Y. he is absolutely bound
provided the indentures are legal -

3 Bac. 547. Co Ca. 179. 4 Mod. 190. Doug. 101. 5 T.R. 716

R.L. 106.

Master & Servant.

Misusage by the master is good c
of departure by the minor & he
not bound by the covenant, t
1 Salk. 510. the master is liable for the
10 Co. 420 upon in England.

In the State of N.Y. the Statute
R.L. 189. 190. points out the remedy. 2d. vol.

In N.Y. also Executors wh
R.L. 191. an indentures by last will and
testament of a father to bin
up his child, may bind the
child by indenture in the fa
manner as the father might
if living.

It is said that a discha
2 Ray 1117. on an indenture to be good must
Salk 68. Mod. 182. be by deed. But this according to th
general rules that the discha
must be of as high a nature
the contract.

This rule amounts to nothing
more than that it must be
writing & is of as high a natu
as the indenture.

Cancelling or delivering up
5 Co. 502 indenture is a good discha
for in this case no contra
exists after the cancelling.

Master & Servants.

In the case of Seymour & Maville in Conn. it was decided that after the master released the apprentice by parol, he could not maintain an action against the father on the covenants. This seems to militate against the [illegible] rule but Mr. C. thinks it with the spirit of it & that it is correct.

The apprentice may be discharged otherwise than by deed in Conn. by the County Court for gross misconduct or misusage in the master. There is a similar case made in England by the quarter sessions. 1 Bl. Com. 426. 3 Bac. 550.

In N.Y. the master or apprentice may be discharged from the indenture by the Sessions if the money was paid upon binding away, for gross misusage, refusal of necessary provisions or cloathing cruelty or other ill treatment he discharged by three justices of the Mayor Recorder & aldermen of any city, or any three or more of them, by warrants under their hands & seals. R.L. 190.

Master & Servant.

The master cannot assign the apprenticeship, and this is agreeable to principle for one may be himself & a father his son to one when he would not to another.

It is a general rule that a personal contract cannot be assigned. This is a contract of a personal nature & trust.

12 Mod. 558 Mod. 134 3 Keb. 519. Doug. 69. Salk. 66

By the custom of London the apprentice may be assigned. If upon submission to arbitration the award is that the apprentice may be assigned, the award is void unless on the agreement of the parties.

Str. 1267

Tho at com law the assignment of an infant will be void, as to the father & apprentice. Yet it is good between assignee & assignor & passes the right of the master tho' not that of the apprentice. Yet if the apprentice consents & serve the assignee he may. But may retract the consent when he pleases. While he does serve he is an assignee and has all the rights of apprentices.

Ray 803. 1 Will 96. Doug. 69.

4 Com 95. 2 Ley 95. Salk 66. Ray 803.

Or the right of the master is not assignable so upon the same principle that not transmissible to his personal representatives.

Master & Servant.

The master cannot send the apprentice to a distance from him - And it is his duty to keep the apprentice under his own care - 8 Mod 238. 12 Mod. 448.

It has been once decided that the executor upon the death of the master is obliged to procure the apprentice institution - Noy. 134. 5. 1 Lev. 177. 1 Sid. 216.

This is denied to be Law. 5 Vin. 1267. 5 Vin 1267.

It has been a question whether the representatives of the master on his death are liable to support the apprentice with necessaries - According to the current of authorities they are. 3 Salk. 41. 1 Keb. 761. 820. 4 Com. Dig.

Mr. G. questions the propriety of this rule. For a minor may be bound out when young & his profits are not sufficient to defray the necessary expences of his support - if the master dies while this is the case it seems to be unreasonable that the executor or admr. should be liable when the minor is not liable to sue the executor - But Mr. G. supposes the decisions were upon a different principle -

It is frequent for the master to have a premium for instructing in a lucrative trade or profession - If the master dies immediately, the Court of Ch. will compel a part of the premium to be returned. 1 Ver. 460 Newton Rowe. 2 Vin. 396. 1 Atk. 149. 1 Cases 30

169.
Master & Servant.

This was not the rule of the common Law.

If the master turns away the apprentice the Court of Chancery will order a part of the premium to be returned.

2 Ves. 64

If the master becomes a bankrupt the apprentice is discharged & the Court of Chancery will order a part of the premium to be returned & the apprentice may come in as a creditor.

A child of fourteen years old, put with a physician on trial to see how he would like the profession cannot make an election to be a student so as to charge the parent with with an apprentice fee.

Hart vs Horack 1 Cain's 25.

In England justices may in certain cases discharge an apprentice where they bind out with the overseers of the poor

1 Bl Co. 426 Salk 67. 4 Go. 11 Mod. 110.

Whatever an apprentice earns during his apprenticeship belongs to the master - And this is the case where the apprentice is de facto as long as the apprenticeship continues - Master Juvent. Str. 508 1 Inst. 117. n. 12 mod. 415. Salk 68. 6 mod. 69. 1 Vez. 48. 93.

Property thus acquired may be sued for by the master as his own - And the master may bring an action of trover for property thus acquired in the hands of another & Recover for the apprentice - 1 Vez. 93. 12 mod. 415. 6 mod. 69. Salk 68.

The master has this right tho' he did not consent to the service - The rule that the master has the wages for the services where he did not consent, applies to no other servants than apprentices & slaves - 1 Inst. 117 a. Co. L. 653. 2 Rol. Rep. 269 2 Lev. 63.

If an apprentice or any other servant is enticed from the master lawful an action on the case lies against the person enticing - Cow. 55.

By Stat. N.Y. Persons harboring slave forfeits to the owner $12.50 for every 24 hours & in that proportion but not to exceed the value of such slave - And if he die or be lost the person harboring forfeits his value to be recovered by action of Debt - R. 2617.

Master & Servant.

It has been determined that a journeyman is a Servant within the rule relating to apprentices &c

4 Mod. 269.
3 Bac. Ab.

For taking away a servant with force trespass lies for actual

2 Ray. 1117.
Noy 101.
Salk 13 90.
2 T.R. 167.
Ray 1032.
Comyn. 55.

away case is the proper action. But these actions have in some instances been confounded.

Stat Con. 292.

By the Stat. of Con. if any apprentice or other servant over 15 years of age absent himself he shall serve double the time.

R 2. 190.

By stat N.Y. he shall serve double the time he absents himself unless he shall make satisfaction for the loss. Provided that the act does not extend to cases when the master has paid a premium - And no satisfaction shall be demanded after three years after the end of the term of apprenticeship -

III. Menial Servants. — Master & Servant

are so called because they are intra moenia — 1 Bl. Com.

If there is no prior time for the hiring it is construed 1 year — Bl. Com. 1 N.B. 160. 3 Bac 546.

In Conn. & N. Y. there is no such rule practiced upon —

By Statute 5 Eliz. the servant cannot leave the master nor the master discharge the servant without a quarterly notice, or by consent of two Justices —

IV. Day Labourers.

This term needs no definition On this subject see 1 Bl. Com.

Master. Servant.

V. Agents Factors &c.

The fifth class of servants if they may be properly called so are agents. These are servants in respect to property. The principal has not that controul over them that a master has over his servants.

1 Wood. 460. Amb. 257. 297.

They are servants quo ad hoc. And are bound by statute to fulfil their contracts.

No general rules can be laid down on this subject: it depends upon the contract.

4 Com. 227. 1 Wood. 460.

Every agent factor broker &c. ought faithfully to adhere to his commission if he does not the fault or loss lies with him.

A factor may retain the goods of his principal in his hands to satisfy a debt due to him from principal. For he has a specific lien upon all goods in his hands which are as a pledge. But if he give up the possession of the goods he is in the same situation as any other creditor.

1 Bos. 493. 1 East. 4. 335. 4 Com. 220.

For a derelection of the possession amounts to an abandonment of the lien.

Master & Servant.

The factor has a lien on the price of the goods sold by him for the principal so as to prevent the purchaser from paying it over to the principal Com. 251. 256.

And if the vendee pay the money to the principal after notice given by the factor, he may be compelled to pay it again.

A factor however has no lien on the principals goods until he has them in actual possession by delivery 3 T.R. 119. 2 Ves. 117. 1 Atk. 134.

This lien did not exist at common law, but is a rule of the Law merch^t.

If the factor gives more for goods or buys a less quantity or sells for a less price than his commission warrants, he must bear the loss. 1 Bay. 512. 4 Com 228.

This rule applies only to cases where the condition is special. But when the factor acts at his discretion it does not apply. Where he is negligent however he is liable.

A factor has no right to pawn the goods of his principals for himself & if he does the principal on tendering the sum due to the factor may maintain trover for the goods. 5 T.R. 606. 1 B. & Pul. 620. 2 Stra 1117. 1 B. & C. 562

In this case the right of the factor is purely personal and cannot be transferred.

Master & Servant.

But the factor may sell the goo of the principal and maintain a suit in his own name for the pri He may also be sued for goods pu chased by him for the principal for the principal if sold on Ku to the purchaser -

A Factor is a foreign broke if the principal is in the same country he is called a broke And therefore the above rule is laid down as to factors only. This is an exception to the gene rule that a servant cannot sue in his own name for goods of h master -

1 N.R. 130. 17. R. 359. Cow. 256. 1 M. Dl. 362.

The case of an auctioneer is al an exception to the general rul he may also sue for goods sold by h For it often happens that the real owner is not known -

1 M. Dl. 81. 2 D. 591. 2.

An auctioneer is not liable fo selling goods to the highest bidde tho' he sell them for less than th owner directed. But if he is dir to set them up at a certain price & not to sell them under, th auctioneer must comply or b liable.

Master & Servant.

An att[y] has also a lien on the papers & judgments of his client and may direct the adverse party to pay him the money due, and not to his client, and the adverse party is obliged to do it.

This right of the attorney however is subject to the equitable demands of the adverse party upon his own client as to the claim of set off. See 1 H. Bl. 24. 122. 217. 857. 2 H Bl. 40. 507. Doug. 100. 2 Bl Rep. 826.

An attorney when he executes an instrument should do it not in his own name but in that of his principal, otherwise he would bind himself. 9 Co. 76 b. Chit. 24. 27. 56. 75. 1 T.R. 101.

An agent at com. law cannot bind his principal by deed, without an authority by deed, in the absence of the principal. 7 T.R. 209. 3 Bac. 400.

An agent for the public is not personally liable on his contract altho' he contracts in his own name. 1 T.R. 172 674.

Debtors assigned in service.

This does not apply in the State of New York. It is a statute provision in Connecticut.

177.
Master & Servant.

General rules respecting Master & Servant.

1st What acts of the Servant bind the master.

2d What contracts of the Servant the master can take advantage of.

As a general rule those acts of the servant which are done by the master's command express or implied are in legal contemplation the acts of the master.

Regularly all acts done by the servant in the employment & pursuing the business of the master are deemed to be done by his command.

1 Dl Ca. 418. 4 Burr. 2109. 2 H. Bl. 442

Whatever the master commands the servant to do is the act of the master. This is also the case where the master permits an act to be done by his servant in his presence.

Those acts which are done by the servant under a general authority from the master bind the master alone & not the servant. And

3 Bac 554

an action will not lie agt. servant. In this case, it is not necessary to declare that the act was done on the contract made by the servant.

If the servant is cheated of the Master & Servant
masters goods in the absence
of the Master, the master may
recover of the wrong doer. 1 Rol. 98
If the servant is robbed of the Cro J. 223
masters goods in his absence, the
may bring an action. The reason
why the old books why the servant
may bring the action, is because
he is liable to the master.
(the master owning the property
the reason of the rule is obvious)
But this is not the true reason
for the servant is not liable
to the master. The true reason
is because the claim is good
against all persons except the 3 Bac 69.
owner. A recovery by either Salk 613.
however is a bar to all fur- 3. Mod. 259.
ther actions, and may be 4th 303
pleaded in abatement. 11th 01
12th 54

If the servant is robbed of the
goods in his masters presence Latch 127
the master only can prosecute 2 Ow. 37 9
In this case the taking is supposed 3 Wood 209
to be from the master him-
self.

179.
Master & servant.

If the servant commands an act to the prejudice of the master contracts. If the servant acts illegal, if there is found fraud if there is not the master may recover the bank.

2 Salk 613
2 Salk 145
Hawk 1 c 70
3 Bac 559.

If the servant of an Innkeeper rob a guest - the innkeeper is liable - This however extends not to a private house - for Innkeepers are bound to keep honest Servants -

1 B. Co. 430
1 Com. 214.
3 Co. 32.
1 Rol. 2.

So if the servant selle wine to the guest which is injurious to his health, the master & not the Servant is liable.

It is said that if the servant know it to be impure and unhealthy, he is not liable.

But Mr. G. thinks the rule questionable, for if a person command another to do an unlawful act the person who acts upon this command is not excusable -

1 Will 32 n.
1 Bl. Co. 430.
1 Bac 563.

If the servant by command of the master does an unlawful act both are answerable Master & Servant.
Esp. Dig. 5 80 -

But it is said that if the servant has no knowledge of the unlawfulness of the act he is not liable - In the case cited however there was no unlawful act -

But where the act is done with force the servant is liable in every case - 2 Bl. Rep 892

101
Master
& servant.

When the master is liable for the acts of the servant

Those acts of the servant which are done by the master's command express or implied are considered as his - But on the other hand those which are not done by his command or direction express or implied are not good against the master -

Those acts which do not arise out of or in any business of the servant for the master are not by the command of the master - The general rule applies to torts -

Ryan & M. 213.
Salk 289.
1 Bl. C. 431.
2 T. R. 533.

Upon the general principle it has lately been decided that when the servant was in the employ of the master, the master is liable for damage arising from his negligence or unskilfulness But not for any wilful act of the servant, without the direction or assent of the master.

1 East. 106.
6 T. R. 125.
2 B. & P. 462.
1 Bl. 431.
Salk. 441.
Ray. 709.
1 Wood. 465.

Vid. 2 Bos & P. 472. Cont. 1 Wood. 461
Salk 441

Master
to
Servant

If the servant or apprentice of a physician or mechanic does an injury to any person the master is liable. 2 Rol. Ab. 69. 3 Bac Ab. 581. Com 431. There are three cases which appear contradictory but are not. 6 T.R. 125. 2 H. Bl. 442. 1 East 106.

When the master is liable the proper action against him is on the case, even where the damage is done with force. This is disputed by some. But W.G. thinks it demonstrable from the case in East.

Where there is no agent, but the person liable is the immediate wrong-doer by force. then trespass vi et armis is proper.

If the servant employs another servant or sub-agent, the master is liable. And in general the sub-agent is also liable. And the rule is the same however numerous the servants are. 6 T.R. 411. 1 Bro Pa 404.

Master & Servant.

Tho' as a gen' rule the master is not liable for wilful acts of the servant, yet when those acts are in breach of contract between the master & person injured, the master is liable -

1 Pa. Rc. 150. 3 Rl. Con. 156 Ray 910. Com Dig. Bail. 73 -

The relation of master and servant subsists between Sheriff and D.S. The Sheriff is liable civiliter for the torts & wrongs of his deputies in the execution of his office - And the Sheriff may be sued in trespass, when the injury by the D.S. is forcible. This is because the D.S. is not a Known Officer at Com Law.

Doug. 42. 2 T. R. 154. 1 Salk 102. 1 Ventr. 238. 2 Saw 406. 1 Sid. 613. 2 Ro. C. 349. 2 Salk 441 1 Ld.

For mere non feasance the Sheriff alone is liable, but for positive acts the D.S. is also liable

1 Salk 18. 1 Ld. 603. Peak N.P.R. 144

These Common Law distinctions do not exist in Connecticut. There the D.S. is always liable & the party has his election to sue the Sheriff or his Deputy. The reason is that in Con. the D.S. is a Known Officer -

This title will be treated of seperately -

No action will lie against the Exr or adr of a Postmas- Master & Servant
ter for bank notes stolen by one of his Clks out of a letter delivered at the Post office - 1 Johns. 396 Franklin v Low. Exr

It is questionable whether an action can be maintained against the P.M. himself if living - Ibid
Vid Ld Ray. 646. Carth. 467. Salk 17. Comp. 754. Esp D. 624. that he is not liable -

A P.M. however is liable for his own injuries or neglects, and his Clerk is liable for his - 3 Will 44. Comp 765 10 2 2 B.R. 906 Esp D. 623

The rule as to contracts made by the servants for the master is the same as the rule as to torts - For the Master is liable for the contracts of the servant when there is a power delegated to him - This authority may be either general or special either implied or implied - Ray 224 Comb 450. 2 Salk 234 2 Ver 543 643 - 2 Bl. Com. 3 T.R. 757.

A gen[eral] authority to contract is not confined to one in particular but is unlimited or extends to all contracts of a certain species -

Master & Servant.

A special authority is confined to a specific thing.

An authority either general or special may be implied.

A general authority may be implied from the usual practice of the master.

1 Bl. Co. 430

A special authority is generally express. But Mr. C. supposes it may in certain cases be implied as when the master is present & knows of the contract but does not object.

1 Bl. Co. 430. 1 Salk. 294. 1 Show. 95.

If a master usually entrusts a servant with money to buy for articles he is not bound for what he procures on trust.

If the master usually permits the servant to contract on trust he is liable. and this may be practiced so far as to bind the master generally.

Cluit. 26. 1 Salk. 294. Cumb. 450. 1 Keb. 625.

If the goods come to the use of the master, and there was no authority, yet if he uses the goods, it amounts to a subsequent consent which binds the master.

Master & Servant

It has been a question whether the master is liable when the goods come to his use without his knowledge or consent? Mr. G. supposes he is not liable as there is no act but to the contrary. 2 Ray 224 3 Salk 234 10 Mod 210 3 T.R. 760

Tho the master has given the servant a general credit, yet he may put an end to it by forbidding the trades man to trust him.

But if the authority extends generally to the public, the prohibition must be made to public at the credit of the servant. And the dissolution must be made known or the master will be liable. Bromd 64. Public Chit. 26 10 Mod 104 12 Mod 346. Peak 42 54.

If the servant warrants property which he is authorized to sell by the master, the master is bound unless the servant is expressly restrained from making the warranty. 4 T.R. 177. 3 T.R. 757. 5 Esp. 53. Esp. R. 111. Esp. D. 630

When the servant acts under a general authority, no restriction will exonerate the master. 3 T.R. 760 10 Mod. 109 Cro. J. 469. Pop. 143.

Concealing de facto amounts to a warranty. M.G. thinks is questionable. 2 Roll. 526 1 Roll 95. 3 Bac. 560

107.
Master & Servant.

A Servant cannot recover against his master pursuant to a Contract in consequence of practicing deceit by his orders.

Tho' the servant is not regularly liable for contracts made in behalf of the master, yet he may subject himself by a special promise.

Where the servant exceeds his power of contracting he is liable to the master.

2 Rol Rep 276. 1 Rol ab. 95

A mans wife, child or servant acting for him are servants with the relation of Master & servant.

1 Bl Com. 430.

How far the servant is liable to strangers & his master. Master & servant.

The servant is himself liable for those acts which are done by him without the command of the master express or implied. 1 Kin 220. 3 Bac. 562

What are those acts?

They are those which are not in discharge of any business of his master. 101 Co 430. Cp. D. 603. 8 Coup 406. 1 Salk 18. Co E. 175.

There are cases in which strangers may have remedy against either the master or the servant. There distinctions are rather obscure. Mr. G. thinks it is this If the servant thro' ignorance or negligence in the performance of his master's business does a wrong. if there is a contract between the master & stranger the servant is not liable. Stra 1003. 1 Willy 320. Cp. B. 580. 6 T.R. 411 125.

Perhaps this rule may not be found in the books, but Mr. G. thinks it deducible from the cases

But if the wrong is formed on contract between the master & stranger, servt is not liable to stranger. But the master is liable to 101 Co 481. 8 Coup 406. Cp. Dig. 603. 506.

109.

Master & Servant.

The case of a master of a ship is an exception to the case of Contracts. The reason the Court say is that the master is rather an Officer than a Servant. The rule is founded in policy & convenience.

8 Salk 440. Carth 488. 1 Ventr. 190. 2 Ld. Ray. 920. 6 T.R. 125.

A Public agent contracting as such is not liable for his Contract.

Agmoo. Coup 69.

But indeb. assp. will lie against a public Officer when he extorts or receives money for his own use.

Cow 102.

An atty is not liable for bringing an action when he knows there is a release, for he is in this case a Servant.

1 Rol. Ab. 95. 1 Mod. 209. 2 Bac. 795.

But when he acts fraudulently he is liable to the party aggrieved. Cf. Dut. 125.

These are the general rules when the Servant is liable to strangers. But the Servant is liable to the master for all wilful or for negligence.

3 Bac. 564. Coup. 263. 10 Mod. 109.

But no action lies for disobedience unless the master has sustained damage.

1 Ld. Ray. 480. 1 Lev. 188. 2 Keb. 881. Moore 240.

The master has the same remedy when there is negligence and damages sustained in consequence of it when there is no express command. — Master & Servant.
2 Wils. 325. Cro. 617. 4 Burr. 206.

Diligence and fidelity of the masters are the duties of servants. And as a general rule they are liable for neglects there. But this is not a universal rule for sometimes persons performing skill act as servants. 3 Burr 564. 10 Mod 109.

From this rule it is that the servant is not liable for robbing of his master's goods because ordinary fidelity & diligence are not a guard sufficient to prevent it. 4 Co. 2 Burr 564.

But for those neglects which ordinary diligence & fidelity would prevent the servant is liable to the master. 2 Ellis 1083.

If the master is actually in the wrong for the acts of the servant & a recovery is had of him. the servant is not liable to the master. 1 T.R. 196. Ward. 164. Kir 106.

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Master & Servant

Master's authority over his Servant -

The Master has a right to chastise the Servant for any neglect or breach of duty.

1 Bl 176. 1 Bl. Com 428. 1 Roll Abr. 111. 130. 16 Eliz 7a.

But the chastisement must be reasonable or the master is liable to the servant -

3d case cited 2 Mod. 167. 8 Mod. 120 -

The distinction as to what servants may be liable to chastisement is not very explicit in the books -

W. C. thinks it doubtful whether the right of correction extends any farther than to those servants that belong to the family & who are subject to the personal government of the master -

The master may correct his slave or apprentice of any age - The correction must be reasonable - therefore a wounding of the servant by the master is not justifiable.

2 Mod 167. 8 Mod 120. 2 Roll. 390.

Master & Servant

There is much dispute in the books as to what shall constitute a wounding. When the master pleads a justification he must shew that there was a retainer or that the person was his servant. And he must state where the business of the servant is as, or when he was employed. Sid 177.

This right of chastisement is purely personal and cannot be delegated to another. 9 Co. 76. 2 Mod. 167. Ray 62. 370. Stra 953. Co J. 360.

If the master in correcting his servant kills him, he is guilty of excusable homicide, manslaughter or murder according to the circumstances of the case. Foot. 262. Kel 65.

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Master & Servant.

Master's remedy against persons for injuries done to the servant.

Cro. 65. 1 Wms. 569. 8 Salk 305. Ray 1116.

An action will lie for inticing away servants bid. ante page 174.

2 T.R. 167. 2 Ray 1532.

If a servant without intitlement leaves the master and is employed by another knowing of the other master, an action will lie against the person harboring.

Salk 330. 3 Salk 191. Ray 1116.

An indictment will not lie for an intitlement, as it is no publick offence.

9 Co. 113. 10 Mod. 131. 2 Bulst. 64.

If a servant is beaten he may have an action of assault & battery. If the master loses the services of the servant he may have an action for the loss of service. The acts are distinct & one does not support the other. The master must prove loss of service.

Cro. J. 610 2 Rol. 552 1 N.C. 429.

A minor child is a servant to the parent within these rules. And an adult child may be within them.

If the servant is beaten so that he dies in England the master has no remedy, the private offence being merged in the public. Fitz. Dig. Rol. ab. 568.

If a servant is employed by a Surgeon & injures a wound, the party injured may have an action against the Surgeon. 1 R. ab. 90. 1 Rol Rep. 124. 2 Bulst. 332. Cf. Dig. 601. Roy 214 2 Will, 359.

The master when the servant is injured away may have an action either against the servant or person inticing. But if the is a recovery against the servant it bars an action against the other. Qu. if a recovery against the person inticing, a bar to an action against servant? 3 Burr. 1345. 1 Bl. Rep. 397.

195.
Master & Servant.

What acts the master or servant may justify in behalf of each other?

The master may maintain an action for the servant, which any other person would lie for maintainance -

1 Bl C. 429. 2 Rol 115.

It is clearly settled that a servant is justified in an assault in defence of his master -

Salk 407. 3 Bac 568. 2 Roll. 546 tit -

But whether a master can justify an assault in defence of his servant is a question - It is said that he cannot because he may have his action for loss of service - But this rule would destroy the Exhilaration in any case - N.J. thinks clear that the master may defend his servant - 3 Bac 568. 2 Rol. Ab. 546. Salk 407. 1 Bl. Com. 429 -

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Executors & administrators

Preliminary observations without authorities.

When a man dies having made a will and appointed a person to carry that will into execution, that person is termed an executor. If the executor refuses to serve an administrator is appointed whose duty is the same as the executor, and he must be guided by the will. this is his law to direct him.

Under the english Law, the real estate where there is no will vests absolutely in the heir. in case of a will in the devisee. And the Exrs or admrs have nothing to do with it. But of the personal property the Exrs or admrs have absolute title as trustees. It is their duty to pay the debts of the deceased and when there is no property they are compelled to do so.

There is one great case in which the law is different from what it formerly was. Where the executor has paid all the debts, & done his duty in every

case there is no residuary legatee, but a surplus of property remains and the question was whether this surplus went to the executor. According to the old law it did so. But the Court of Chancery have altered the law in some respects and indeed introduced a new principal on this subject. When it can be proved that the testator did not intend that the Ex- should have the surplus he will not take.

If there is a legacy of any amount only for a special purpose as a mourning suit, or a ring &c. will be presumed that the testator did not intend that the executor should have the surplus.

In Con- the Law has always been different. The surplus property is distributed, according to the Statute of distributions. In Con- the Ex- is paid for his services in England he is not.

In order to pay debts, the executor has absolute power over the personal estate.

Indeed the executor has a discretionary power to legacies and may pay debts Exec^r & Adm^r. even a specific legacy to pay debts.

In England the land in the hands of the heir is liable for specialty debts but not for those on simple contracts - But by the Common Law the lands must be in the hands of the heir. therefore if he disposed of it, he was not liable and in this manner might evade the Law - but this is remedied by Statute of Wm & Mary which directs that if the heir disposed of the land he would be liable out of his private estate -

There is one great defect in the English Law - that is in case where the specialty creditors take the personal property - here the simple contracts creditors are ousted, & there is no remedy provided - Chancery however will allow the simple contract creditors to take the place of the specialty creditors & come up the heir for so much as the specialty creditor has taken of the personal property - Still it defective for many debts may be left unpaid, when

Execu: & Admrs

the personal Authority is insuff: cient to pay simple contract debts and the real estate is not liable. - In the State of Va. this is remedied by Statute

R.L.246. Creditors may sue heirs & devi: sees on simple contract and specialty debts. And they are answerable for false pleas.

Heirs also who are liable to the debt of the ancestor, alie: ing the Land before suit brot are answerable to the value of Land - and execution shall be taken out to the value of the Land as if the same were the proper debt of the heirs. But the Lands bona fide alienated before action brot are not liable to such execution.

Heirs may plead nothing by descent - and on an issue there if the jury find for the Plaintiff they shall inquire of the value of the Lands descended & judgment shall be given accordingly.

Devisees made liable, and charg: able in the same manner as the heir may plead the like pleas & are liable to the same judgt & execution -

The creditors are prefered as in Execrs
ations against executors and & Admrs
administrators -

In Comm^t also Lands are liable for all debts - There is no deficiency to beg as there is property - The personal property must indeed be taken first - Then all debts are equal i.e. there is no distinction between Specialty & simple contract debts - The estate also vests in the heir immediately on the death of the ancestor - It is liable to be defeated in case of deficiency of property to pay debts - If there is a voluntary Specialty debt it will be postponed to all other Specialty debts The maxim is that a man must be just before he is bountiful -

Execut. & Admin.

There is one case when Judge Ru
supposes the law different in this
County from the english law.
That is where the executor
or admr. owes the testator de
In England the ex or ad is
bound to account unless there is
deficiency of property to pay de
In this County he must
account -

When lands were liable at com
law the execution could never
issue against the heir, but by statu
it goes against the land of the de

If a man will that his real
property should be sold for
the payment of debts, it is ea
stand to mean when there is a
deficiency of personal prope

It is the duty of the Execut
to pay legacies after debts and
& of the administrator to dis
tribute -

Distribution of property.

The Statute of Charles 2 is the basis of the law on this subject; in the U.S. it is of importance to be acquainted with this Statute, as it regulates the distribution of real as well as personal property in this country. In England it relates only to personal property.

This Statute directs that when a person dies intestate one third of his estate shall go to his wife and the remainder in equal shares to his children and their legal representatives - in default of these to the next of kin & their representatives.

To be acquainted with the Statute it is necessary to understand the terms made use of in the Statute as next of kin representatives.

While representation exists the estate descends per stirpes. When it ceases, per capita to the next of kin -

The term representatives extend to brothers & sisters children and then ceases -

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Descent & Distribution

The term next of kin is regulated by the civil law - When consanguinity is reckoned next of kin to the law - To find the next of kin you take the propositus & count up to the common ancestor & then down to the person who is to be as many degrees distant as the number counted -

The half blood stands in the same situation as the whole blood, for proximity and not quantity is regarded in this case -

An estate may vest in posthumous children & distribution is made to them as they are born before it takes place -

The Statutes of Jamy 2d degree the mother in case of brothers & sisters but in no other case.

Authorities to the foregoing subject 2 Bac 429. 2 Bey. 213. 2 Ch. Pre. Ch. 20. 5 4. 1 P. Wms. 25. 594. 3 P. Wms. 50. 1 Salk. 1 Atk. 455. 2 Atk. 215. as to the half blood taking. 1 Vent. 372. 3. 425. The case destroying the Equity of the law of descents 3. Atk. 72 Vid. R. L. Ng. 44. & 530. -

Vid. 3 Salk. 762. cont. ante.

Duty of an Executor. Executors & Admrs

What the law is to the administration & distribution, the will is to the Executor as to the payment of legacies.

A Legacy is a bequest of personal property, a devise of real property. Co Lit. 111 2 Atk 590.

Legacies are divided by writers into Specific & pecuniary. The first is for a particular identified thing - the last where the testator nothing identifies as so many dollars in general terms - A preference is given to the Specific legatees where the estate is not sufficient to pay all the legacies - 1 Ves. 31. 2 Ves. 608. 10. Wms. 422. 3 Atk 96.

If the executor conducts himself with the property he is not liable to account - Bro Ch. Ca. 495.

Where there are a number of Specific legacies and a part of them are sold for the payment of debts there is no law to compel the apportionment - But Chancery have in some instances, under the circumstances of the case -

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Exec^rs & Adm^rs

Pu. Ch. 392.

Where a specific legacy is given & the testator orders a sum of money to be paid out of it, the money must be paid before the legatee vests or can be taken.

Vested & Lapsed legacies.

By a vested legacy it not meant that it should vest at the time given, if it is certain that the legacy will finally pass, it is a vested legacy.

1 P.W. 300. Loo. Wills 206. 2 Bev. 207.

A Lapsed legacy is one depending on some contingency, which may prevent the legatee.

3 P.D. 521. 916. Pre Ch. 100.

There is a very nice distinction where the legatee survives the testator. If the sum given is a specific sum to be paid at such a time and not made payable at the time, if the legatee dies before the time, the legacy is considered as lapsed.

Pre Ch. 21. Shu 020 at such a time and not made payable at the time, if the legatee dies before the time, the legacy is considered as lapsed. 1 Bey. 542. 2-17. 2 P.W. 610.

But if made payable at the time, when the time arrives it is a vested legacy.

There are exceptions to this rule distinct from those where the intention is manifest for here the intention is always regarded as the polar star. If the legacy is charged on land it is always vested. 2 Ves. Jun. 610.

If the legacy is put on interest it is never vested but always vests. 3 Ves. 673. 10 Ves. 462.

So it makes no difference what words are used when the legacy is out of a fund yielding an annual increase as bank stock &c. 2 Bro. Ch. 3. 2 Bro. Ch. 317. 1 Atk. 522. 2 Ves. 30. 203. 207. 2 Vern. 470.

Where a legacy is given to one at 21. & in case he dies is limited to another; the Courts have gone so far as to make up the supply of words in order to carry the intention of the testator into effect & decided that this legacy was good & the remainder man in case the contingency happened.

There are some cases where a legatee is not bound by a contingency but takes the legacy. As where a man says he bequeaths & have a legacy if he will not contest the will, the condition is void. 1 Ves. 91. 3 Bar. 479. Mad. 96. 10 Ves. 20. Stra. 214.

This is a single case but there are a number of others, as restraints of marriage &c. this is upon principles of policy.

Executors & Admrs.

There is one exception to these general rules, as where a man dies leaving a widow & children, if he gives her a legacy over and above what the law gives her, she is bound by the contingency for the purpose of having the children well taken care of. But I. R. supposes it would not extend to the rule after the children became of age.

10 Wm. 205.

It has been decided in some times that a distraint was not a good many a patent was good.

10 Eliz. 199. 1 Atk. 80. Cruch. 565. 3 Bac. 400.

There is one species of legacies called in terrorem these are generally good.

Doctrine of Chancery respecting legacies formerly.

More than a century since it was held that if the Legator gave his creditor a legacy & he accepted it, it should satisfy the debt. This doctrine I. R. supposes to be abrogated.

If the legacy is not paid as soon as the debt it will not be considered in satisfaction. and it has been decided that if the testator left it in satisfaction he must so express

or it will not be so considered.
3 P.W. 533. Pr Ch: 240. 394. 236. Execr
1 Veg. 124. 521. 263. 3 P.W. 226. Assrs
2 P.W. 555. 616. 2 Veg. 409. 636.
1 P.W. 410. 3 Atk. 96.

This doctrine applies to Debts.

There is another case, where he agrees to make a settlement on his wife - this agreement may be satisfied by will, and if there is a provision by will this is considered as satisfactory of the agreement

3 Veg. 53.
Pr Ch. 263.
1 P.W. 424.
1 Bro Ch 505
1 Veg. 95.

Executors & Admrs.

Repeated Legacies.

The rule as to repeated legacies is that if the legacy is repeated in the same instrument & in totidem verbis, one only will take effect otherwise they will be considered as two legacies & take effect accordingly.

1 Bro C.C. 309.
2 Ves. 628.
10 Ves. 423.
2 Atk. 213.

Ademption of Legacies

Pre C.C. 263.
1 Vez. 95.
2 Vez. 115.

By ademption of a legacy is meant the taking of one with an intention of taking it away.

If you can suppose that the testator intended that the legatee should not take the legacy it will be an ademption, otherwise not. — The accidental diminution of a legacy may not be an ademption, and may not be an ademption, according to the circumstances of the case.

3 Bro. 470.
2 Vez. 631.
2 Vent. 352.
2 Bro. Ch. 608.
1 Mod. 273.
2 P.W. 328.
Amb. 401.
2 Vez. 625.

When a man devises away all his property & afterwards acquires property it will all pass. i.e. the personal property will pass not the real.

When property is given at a certain place it is necessary that this property should be at the place at the time the legacy was made

L.R. is not satisfied with the decision. The case of a thief seems in some measure to come into the rule.

Tho the Chancellor seems to think there is a difference. See further on this subject the cases in the margin.

Executry of Adam 10 Eq. 273.

1 Bl Ch. 129. & D. 537.

Execrs & admrs

What provision the Law has made for the Executor when he pays legacies before debts and then is not sufficient to pay debts?

The Exr is not bound to pay legacies without a bond from the legatees to refund in case of debts.

2 Veg. 350.
2 Veg. 264.

R.L. 539.

By the Statute of 44. Every person intitled to a legacy shall at the time of payment give bond in double the sum of such legacy with sufficient sureties, to the Exr or admr conditioned that if any debts owing by the testator or intestate shall afterwards be recovered or made to appear & no other assets to be had also in case of a legacy, if no sufficient assets shall thereafter remain to pay other legacies which may be due, then he shall refund so much as is necessary for the payment of debt and costs & charges which may accrue & in case of a legacy the proportional part of such legacy if there be any.

R.L. 539.

If no time is limited by will for the payt of legacies, the Exr has one year to discharge them. At the same time & distinct

Where the Exr is a bankrupt & pays the legacies the creditor may come upon the legatees. Executor Admr

It is a question whether a pecuniary legacy given to the executor for his care & pains abates when there is an insufficiency of assets. It has been decided that it does. *1 Veg. 94. 2 Veg. 205. 2 Vent. 358. 2 Vent 360. 2 Ves. 434.

Payment of Legacies.

Legacies are never barred by the Statute of limitations tho' there may be such a length of time elaps'd that it will be presumed paid.

To whom may the Exr pay the Legacy?

He is never justified in paying it to the father of a minor. But he may pay it to the guardian appointed by the Court - because the latter has bonds - the father has none. 1 P. Wms 206. 1 Bac 485

Legacies given to the wife, when they come to her belong to the husband. 2 Ves. 261. 659. Moore 685.

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Exec^rs & Adm^rs.

The time the legacy is payable.

If there is a time appointed, that will be the time of payment; if no time is limited the Executors have one year to pay the legacy after the death of the testator. But the Executor is not bound in any case to pay until one year has elapsed.

R. L. 539. 1 P. W. 696. 2 P. W. 80.

Legacies are not on interest until demanded & this rule applies to all cases where it is the duty of the debtor to call for the money as in case of trustee. If demanded it is on interest.

3 Atk 101. 2 Atk. 329. 2 Atk 109. 1 Ves. 251. Pre Ch 161.

If the legatee is an infant a demand need not be made in order to carry interest.

3 Atk

Pop 104

A year in the case above mentioned is according to the common acceptation of the word.

Salk 415. Pre Ch. 11. 161.

If the time is fixed for the payment of the legacy, it is said that it is on interest from the time due.

But L. R. supposes there is no difference in either case

Execrs & Admrs

Construction of Wills as to legacies to whom given &c.

If there can be a probable construction so as to keep the legacy it will pass, but if not it will not go to any one but by the Statute of distributions. Co Lit. 112. Pre Ch. 470.

If a will is made giving no party to the children of J. S. and he has no children if he has children afterwards, they will take the property, as the will is to take effect if it can consistently. 2 Ver. 105.

Where there are no children & gives effect to the will, grand children will take under the term children 2 Ver 107.

In all cases respecting wills the intention is to be regarded with out technical terms.

When the will gives the estate generally to the relations, they will take as if the person had died intestate.

The executor in England is not bound to give bonds, as he is in this country. Loo. Wills 213.

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Exec^rs & Adm^rs

In certain cases the legatees go against the heir as in case of bond creditors - 1 Balk 416.

When the lands are devised for the payment of debts, devisees must come upon the land, when the personal property has been taken for the payment of debts. 3 P.W. 322

In case of a trustee, to avoid if the person abuses the trust the Court of Chancery will execute that trust - 2 Ves. 421. 513. 1 Ves. 355.

How legacies are recovered

In England the Spiritual courts & Chancery have concurrent jurisdiction. But Ch^y has exclusive jurisdiction where the legacy is charged on real property. 1 Bro 45. 6 Mod 26.

In N. Y. the Statute points out the mode of recovery - R.L. 540.

When there is no assets in the hands of the executors & a suit is brot against them they may plead plene administravit - But the Exec^r is liable for devastavit.

Executors & Admrs

Donatio causa mortis

is a specific present in contemplation of death - This is conditional, if the donor dies the property vests in the donee, if not it does not vest - It is necessary that there should be a manual delivery in order to have the gift take effect - This gift is not good against creditors - The action must be against the donee as Executor de son tort -

Pr Ch 269. 1 P.W. 406 441. 3 Br. 357.

It has been much disputed whether a chose in action can be the subject of a donatio causa mortis - The difficulty is, the donee cannot sue for it, as that is confined to the representatives of the deceased - The authorities on this subject are contradictory -

Pr Ch 269. 3 P.W. 242. 3 Atk. 214. 2 Vez. 431. Rob. Frauds 299.

Execrs
&
Admrs

Advancement.

What is given in advancement in order to take under the Statute of distributions must be brought into hotch pot. A provision made by any relation except a father is not considered as an advancement.

Co Lit 176. Putting out to an Apprentice
Pw Ch 170. 1 Atk 444. 454. 2 Vern 630. 1 Br Par ca. 167. portion money & the like are not advancements.

Devastavit

The law does not require of the executor extraordinary diligence nor is error in judgment considered a devastavit.

What are assets in the hands of an executor are also in the hands of a co-executor. But

L Ray 1320. If one co-executor commits devastavit the other co-executors are not liable.

What are assets?

Executors & Admrs.

Personal property in the hands of the Executor is personal assets. Real in the hands of the heir is real assets.

Doors in a house, fish in a pond & rents are real assets.

It was formerly holden that all which descended to the heir was real but the rule is relaxed.

Co. Litt. 85. Ep. 594. Stra. 1242. 2 Bac. 416. to 420. 3 Atk. 13.

The disposal of the emblements of an estate pur autre vie, when the tenant dies during its continuance, goes to the executor.

Emblements are sometimes considered as real & sometimes as personal property. They pass by a deed of the land, & if an injury be done to them, it is trespass. But they go to the executor as personal property.

Tenant at will takes the emblements, when the estate is determined by the lord.

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Execrs & admrs

If a testator die possessed of a term for years, & the Executor of a lease for years comes to the hands of the executor he must annually add to the inventory the profits accruing, & the rule is the same with respect to all accruing profits.

If the testator lives & he makes a lease, the rent on his death goes to the heir.

All reversions go to the heir. Equities of redemption on the mortgages of the testator are, in equity, but not in law, real assets in the hands of the Executor & he may compel a foreclosure. The heir may compel foreclosure, if he will pay the pledge money, otherwise he can not.

Pow Chant. 125.

That species of property called Paraphernalia regularly goes neither to the heir nor Exr.

The first kind of paraphernalia vests in the Executor, the second, only when there is a want of assets.

Lands devised to be sold. Execrs & Admrs

When Lands are devised to be sold for payment of debts, if no person be appointed the Executor must do it. 1 Atk. 420.

If the executor refuse to do his duty when lands are so devised Chancery will compel a sale 1 P.W. 416 2 Ver. 106. 1 Atk 420.

It is a question whether Lands devised to be sold are legal or equitable assets. The more modern authorities hold them to be equitable. 1 Atk 404. 630. 10 W. 430. 1 Brs. Ch. 135. 137. 140.

The executor is liable for the payment of debts to the amount of all personal property which goes into his hands. Lee. v. 93. Bow. M. 277. Talb. ca 53. 1 Salk. 416.

In Connecticut the Executor is also liable when there is real property. for in case there is a deficiency of personal property he may apply to the Court of Probate. and by order of the Court may sell Lands for the payt. of debts. Land may be sold also in Cont. for the payment of legacies.

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By Statute of N. J. when the personal property is insufficient the executor or adms may apply to the Judge of Probates or Surrogate of the County in which Probate

R. L. 323.

the will or administration shall have been granted to the Judge or Surrogate will on pursuing the directions of the Statute order & direct the whole, if necessary, or if not so much of the real estate as will pay the debts of the intestate -

R. L. 324.

If any houses & lots are to be sold that a part cannot be sold without manifest prejudice to the heirs or devisees - the order may be for the whole or a greater part than is necessary to pay debts & the overplus money must be distributed among the heirs & devisees -

Ibid

Conveyances on such sales are executed by the Exr or admr & the order must be cited for that purpose in the conveyances -

Ibid.

The proceeds of sales of real estate are deemed assets in the hands of the executor -

When the whole estate is ordered to be sold the proceeds must be brought into the said Court of Robates or Office of Surrogate & if the same, after deducting expences, will not pay the debts. the Judge or Surrogate will cause the same to be distributed among the creditors — 220 Exec'rs & Admin's

R 2.324.

The real estate cannot be sold before the personal estate is exhausted —

Executor & admr

Executor de son tort.

There is one case when the person acting as executor is neither Executor nor administrator. This person is called Executor de son tort, or in his own wrong. It is one acting without an authority from any person & doing such acts as belong to the right full executor or administrator.

Any unlawful intermeddling with the effects of the deceased will make a person Exr de son tort when acting without authority. As for example, taking the effects, converting them to his own use, paying debts out of the effects receiving and suing for debts due to the deceased & in general all acts transferring the effects will make a person, unauthorized, Exr de son tort.

The value of the effects is not material, provided the intermeddling be unlawful, for the act must be unlawful.

Exec^rs & Admrs

Thus feeding the cattle of the Dec^d paying his debts with his own money repairing buildings in decay, providing necessaries for the Children &c will not make an executor de son tort.

What acts are sufficient to make an executor de son tort is a question of Law. The rule of discrimination is this; If the act of the Stranger be such as fairly warrants the inference, that he claims the management of the estate he is Ex^r de son tort, otherwise he is not.

Authorities for the foregoing rules 1 Com 264. Dyer 166. 2 T.R. 99. 2 Bac. 300. Mod 166. 7 Co. 33. Salk 313. 319. Cro Eliz. 406. 810.

If one intermeddle with property even in pursuance of directions from the testator he is executor of his own wrong. 2 Str. 97.

A fraudulent gift by the Dec^d - God. 94.
himself will make the Donee Ex^r in - 1 Com 265.
de son tort as to creditors, but not as to next of kin &c for it is good against them.

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Executors & Admrs.

It is said the widow of the Dec. becomes Ex.x of his own wrong by taking more apparel than is suitable to her degree. This I. R. supposes does not deviate from the general rule. But I suppose it does.

2 Dall. 97. 5 97. 2 Vol. 271. R. L. 530.

By Stat. N. Y. Every person who shall obtain or receive any goods or debts of any intestate, or a release or discharge of any debt &c. upon fraud, whereby the creditors are injured, or without a full consideration, such person shall be chargable as executor of his own wrong to the value of such debts and goods &c. deducting all just debts due to him from the intestate & all payments made by him as the same ought to be allowed to lawful executors or administrators in the course of administration.

Can an Executor de son tort Executrix & Admrx
exist when there is another
Ex^r or adm^r duly appointed?

Judge Reeve supposes this can
not be the case - But in all cases
the wrong doer will be treated as a
trespasser to the rightful Executor
or administrator. 1 Salk. 313. 317. 302. 307.-

Yet if the wrong doer claims to
be executor, he may be treated
as Executor de son tort -

If the intermeddling of the person
be before probate, or in case of
intestacy of administration granted to
the person is executor de son tort.
If he takes possession of any pro-
perty he is liable to creditors
until he delivers over the pro-
perty to the rightful executor
before action is brought -

The ground on which he is liable
to creditors is that from his acts
there is a presumption that he
is the rightful Ex^r or legal repre-
sentative of the deceased - And
this presumption he has no right

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to disprove, when his own wrongful acts warranted it. 12 Mod. 471.

An Exr de son tort is liable to all the troubles of an Executor without any of the advantages & profits arising from that office. He is liable to be sued but cannot sue.

2 Mod. 91. 5 I. Ca. Eliz. 630. Yelv. 137.

How or to what extent is an Exr de son tort liable

He is liable only to the extent of assets when he has conducted properly.

Loo. 51. Cauth 104. 1 Mod 127. R. 2. 530.

And he may plead plene administravit & acknowledge himself executor. But the plea will not be good against a rightfull executor

2 Bac Abg 90 note. 1 Vent. 349. 2 Ch. Ca.

An Exr de son tort cannot retain for a debt due to himself even against creditors of an inferior degree.

But if he pays debts with his own money he may retain to the amount of debts so paid.

2 Mod 12. 5 I. 441. 471.

If he afterwards obtains letters of Exec^r
administration, he may retain Exec^r
for his own debts against cred- Adm^r
tors of equal degree.
1 Com 266. Stra. 1106. Carth. 104.
Co E. 630.

He is treated by the rightful
Ex^r or adm^r as a trespasser; but 5 Co. 31.
by a creditor he is held generally 1 Mod. 200
as executor. 5 27.

Tho' an Ex^r be compelled is generally
only liable to the extent of assets, yet Co E. 472.
if he plead ne unques executor 1 Roc. 49.
he is liable for the whole no re- 1 Rol 919.
gard is had to assets.

Exec^rs. & Admr^s.

Who is intitled to administration?

Originally the Clergy had the management of this business & made a very improper use of the powers given to them.

At length a Statute was made giving the administration to the "next best friend of the Deceased". After this the Statute of Distributions gave it to the widow or next of kin.

4 Bl. Com. 496. 504

Administration is granted by certain courts appointed for that purpose.

1 Rol 909.

If the right of administration devolves on an infant, administration is granted to some person during minority.

Hob. 251.

This may be any indifferent person; no regard is paid to next of kin.

Administration may be granted to a creditor when other refuse.

It is a general principal that when there are a number of Executors the power may be exercised by one - Administrators must all join.

1 Salk 308.

In N.Y. admin is granted to the widow or next of kin if they use/except in the city & county of N. York & any other proper person. Execrs & Admrs

R.2.310.

No admin is to be granted till satisfactory proof of the death & intestacy of the person.

In the city & county of N.Y. if the widow or next of kin do not apply in one week after the death of the intestate admn is granted to the Chamberlain of N.Y. & his successors who shall take the oath & give bonds as admr is to be - And the Corporation of N.Y. are responsible for the due administration - His powers are revoked on the application within three months of the widow, child father brother or sister of Dec, if any be due which may be due & to be first paid -

R2.321.

The Chamberlain must account annually to the Corporation & the statement must be published in two of the newspapers of said city.

The commissions of Chamberlain are five per cent upon receipts besides reasonable expences.

Execrs & Admrs

The administrator enters into a bond conditioned as mentioned in the Statute.

*R2.320.

In England the Ex^r does not give bonds - but the Court of Ch sometimes interferes, when he does not do his duty, & obliges him to give bonds.

If the administrator does not pay debts or commits devastavit - this is not a forfeiture of the bond - as it is not considered on the part of not administering according to law.

The administrator must within six months after adm^n file an inventory of the goods & chattels & credits in the Surrogates office or Court of Probate. The next thing under the bond is that he must administer according to law. Next he must distribute

1 Salk 316. to the next of kin in case of a surplus.

Letters of administration may be repealed. as in case of a will found, or the incompetency of the administrator

What is done by any administra- Exec^rs.
tor duly appointed, is good, in case
of a repeal of the Letters Probate adm^rs.
&c the same acts would be
good in the rightful administra- 1 Salk. 400.
tor.

The gen^l rule is that the acts of
a person acting
under a void authority are not good.
It is of some consequence to know when
the acts of adm^r appointed by mistake are
good. If what the first adm^r does is in 3 T.R. 125.
direct opposition to what the latter 1 Show 411.
might have done, such acts ought to 2 Lev. 103.
be invalid. 1 Vent. 309.
3 T.R. 130.

When the adm^n is given by good auth- 2 Bac 411.
ority, the acts may be considered legal Com Dig 102
if by an incompetent authority they
they are void.

Where Letters of adm^n are found to 3 T.R. 120.
be under mistake if the mistake Co E. 460.
be rectified the acts will be good 2 Lev. 92.
if not they will be void. 6 Co. 18.
1 Bac. 190.
1 Mod. 62.
1 Vent. 349.

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Execrs & Admrs.

Where Executors & administrators may sue & be sued.

It is a universal rule that when debts are due to the dec^d the Ex^rs or adm^rs may sue. When due from the dec^d to another person they may be sued.

The Com. Law on this subject was very defective. This was remedied by Stat. Ed. 1 by Stat. R. 2. 536. of N. 4. - by which the Ex^rs or adm^rs may be sued in actions of trespass for goods & cattle taken away by or from their intestate or testator in his life time.

They may also by this Statute have actions of account, when intestate could have had the same they may also be sued in the same action.

This Statute is construed to extend to all injuries done to the property, where the injury is direct.

I. Ray. 71. 2 Nal. 439. 445. 1 Bent. 30. 3 P. R. 549. 2 Ray. 971. It is said as a general rule that the ex^rs is liable for the torts of the testator. But this rule only applies to cases where the assets are benefitted by the tort. P. R. supposes the rule not binding enough & may operate unjustly. He an important Com. 972.

Executr & Admr

There are contracts where the Exec^r is not liable. As in case of an Officer where he does not do his duty. Here the Officer does not come upon the employ^t & therefore the ex^r is not liable for his misconduct.

When there is a suit commenced by the deceased in what case it abates?

In all cases where the action could not in general be brot by the executor the suit abates. But where the executor could bring the action, it does not abate. In this case the death of the testator is suggested on the record & the name of the executor is entered.

Co E 377 Latch 4 6 6. 9 Co 37.

It may happen that the executor may sue in his own name without naming himself an executor. As

2 Ab. 447 Execrs. & Admrs.

4 Dig. 280.

as in case of trover for goods taken after the death of the testator - And likewise for rent accruing after the death -

But the executor may sue as executor -

By the old common law the executor was not liable for costs when he sued

R.L. 529.

The Statute of N.Y. concerning costs, excepts executors & administrators suing in the right of the testator or intestate - But they are liable

2 Bac. Ab. 446. Plow 183. Hard. 165 Stra 602. 1 Salk. 92.

when they sue in their own name, or might have done so -

Execut
&
Admin

Exec'rs & adm'rs

Is an executor obliged to take advantage of the Statute of limitations?.

This question has occasioned much litigation - It is now settled that an executor is not liable where there is no doubt that the debt is due - 1 Salk. 525.

But he is obliged to take advantage of an illegal contract.

There has been much dispute with respect to usury, I. R. think he ought to be compelled to avoid the whole contract, but only the usurious part - The law is unsettled -

But where the whole agreement is illegal he must take advantage of it -

An inventory is not a certain criterion for the administrator to account, as if the property is sold for more, he must account for more - if for less he is not bound by the inventory but may account for less -

The object of the inventory is to show what the property is - and how much - the appraisal is to assist the surrogate in accepting the account - Exec^rs & Admrs

It is the first duty of the Ex^rs or adm^rs to see the Dec^d buried & the expences of the funeral paid before debts are discharged. And also the expence of taking out letters of administration.

Debts must be paid according to rank - if they are not the ex^rs is liable, if knowing & the higher debts - 2 Bl. Com. 511.

1st After funeral expences &c debts due to the crown, are the first class of debts to be paid -
2 The next are those made superior by certain Statutes, as 4 Geo 2 in last sickness - &c
3. The next class are judgment debts and under this head are mortgages -
4th Specialties, or those under seal - Lev. 51 to 57 -

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after creditors are paid, volu-
tary bonds are paid.*

Where there is not property
enough to pay all debts, the
executor may pay which he
chooses first of the debts of
equal degree. Except when
the debt is sued, here the pur-
suing first has the best claim.
And where two sue at the
same time, he who first gets
judgment is intitled to the
priority.

4 Car. Ch. 202
1 Atk. 292.

2 Vern. Cas. 512.

Who may make wills of personal property &c.

As to minors' making will, has been considered under the title of Parent & Child.

Alien friends may make wills of personal property -

Feme Covert, were considered under the title Baron & feme. 1 Bl. Com. 372

Idiots are not capable. No difficulty arises where the person is perfectly distracted. But there may be much difficulty in case of persons old & childish The presumption however is that they are capable.

It is not sufficient to set aside a will, to have the opinion of people that the person was incapable, such facts must be proved as shew his incapacity.

A will made upon duress or imprisonment is not good and will, if contested, be set aside -

Exec'rs & Adm'rs

Where there is fraud or undue position practiced on the testator in order to induce him to make or revoke a will. Such will or revocation is void.

4 Bl. Com. 388

Felons and those guilty of treason crimes are incapable of making wills.

R.S. 170.

By Stat. N.Y. No [illegible] woman, infant idiot or person of insane memory shall make a will of real property.

It is generally true that personal property may be disposed of by will.

Where there is a joint tenancy however of any kind of personal property it cannot be so disposed of by the Common law.

Merchants in Co. are excepted from this rule, upon the principles of the mercantile law. Stock on a farm is also an exception.

Personal property may be given with remainder over. But if it be of a perishable nature the donee may dispose of it.

Execrs & Admrs.

Rule in the Construction of wills -

The rule is in all cases, that the intention of the testator if a legal one, is to be carried into effect - Dougl. 325.

Judge R. supposes it is immaterial what terms are in a deuse of to give an estate that may be given -

If there are several wills forms, the last is to govern - but if a former will be published after a later, is good -

In wills of real property four requisites are made which are not necessary in wills of personal property - To wit there must be three witnesses to wills of real property, & personal property none are required - Where it can be proved to be the will of the testator. Lov. 154

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Execrs & Admrs.

Who may be Executors?

Most persons may be executors. Excommunicated persons however are not permitted to be so.

Where a Debtor is made executor by the old Law the debt is extinguished. But this is not the Law at present.

2 Bl Com 512.

An Executor of an Executor is an Ex- of the first testator he chooses so to be. But an Ex- of an Admr- is not the Ex- of the first testator.

As to Commendatine will

R 2. 101. See Statute of N. Y.

Mode of recovery against an Executor -

Executors & Admin~~istrators~~ Exec~~rs~~ & Admrs

Executors & administrators can never be arrested & held to bail They must sign their appearance on the writs -

By stat. N. Y. no lands or other real estate can be sold or in any wise affected by virtue of any judgment or execution against Executors or administrators - R2.538.

The execution goes not against the Ex~~r~~ but against the estate of the testator -

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Execr & Admr

As to Executors taking the residuum in Chancery &c 3. P.W. 41. Pre Ch. 81. 2 atk 47. 3 atk. 226. 340.

By Law the Executor is entitled to the residuum of the estate. But when there is a Legacy given to him Chancery will take it away. but will let in parol proof to shew that it was the intention of the testator to give it to the Executor. This depends on a rule that parol may always be let in to rebut an equity. This is always the case to affect any writing. & gives the legal construction to it & takes away the equity. But it can never be admitted to take away the legal construction.

2 atk 68. 2 P. 340. 3 P.W. 40. 2 Veg. 91. 1 Bro. C.C. 201. 2 P.

250.

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Sheriffs.

Nature of Sheriffs Power of appointment & duty.

Sheriff is a word derived from Shire & reve, two Saxon words signifying the Govr of a County. 1 Bl. Com 339. 343.

The Sheriff in England is a limited by the King out of a nomination of three who are nominated by the Judges - 4 Bac. 431. 1 Bl. Com 340

By Stat. 4 Ed 3. & Rich. 2. the Sheriff held his office during one year only, but now during good behaviour - 4 Co. 32.

In Connecticut the Sheriff is appointed by the Governor & Council & holds his office during their pleasure - Stat. Conn. 303.

In N.Y. the Sheriffs & Coroners are annually appointed by the Council of appointment - Con. N.Y. R.2.1.13.

And no person can hold either of these offices more than four years successively nor the Sheriff of holding any other office at the same time

Sheriffs.

The Sheff may however continue in & execute his office even after the four years are pird, until a new Sheriff is appointed, in his place & shall have delivered to him a writ of discharge.

R.L. 206.

He must reside in the County and has no authority out of his own county - but may go out of the County to complete a process begun in his own.

4 Bac. Ab. 35.

The first rule therefore seems to be nothing more that the Sheff has no original jurisdiction out of his own county.

ibid.

Mow. 37.

The same rules apply to Constables.

The Sheff at com. law may appoint deputies or under Sheffs who may execute his ministerial but not his judicial acts.

Nov. 13. Kit. 214

A writ of inquiry of damages may be executed before a Sheriff's Deputy.

2 Johns. 65.

By Stat. N.Y. the Sheff must as soon as possible appoint an Under Sheriff, during his pleasure who in case of vacancy, death

R.L. 206.

the office in the name of the Sheriff until another is appointed & commission'd & take upon him the office. Sheriffs.

But while the Shff is in the exercise of his office, the Under Shff has no more power than any other general Dy 1 Johns. 73.

In case no under Shff is appointed the Coroner or coroners, if more than one in the County, must act in case of vacancy. R.L.1.207.

The Shff, by the same stat. may appoint as many Dy's beside the Under Shff as he thinks proper.

In Cou^t - all general Deputments must be approved of by the County Court.

A general Dy is one who executes all the acts of the Sheriff - A Special Deputy is one to do a particular act only - It is not necessary for a Special Dy to take the oath to be taken by Dy's of Shffs. R.L.1.207.

Sheriffs.

A D.S. may be removed at the pleasure of the Sheriff - While he remains his ordinary power

4 Bac. 437. Salk 95. Hob. 13.

cannot be restrained.

The Under Sheff in England & N.Y. does no act in his own name, but acts always officially in the name of the Sheff. In Con. he is a known public officer.

Salk 96. Stat. Con. 124. 212.

A writ directed to the Sheff only, may be executed by the deputy.

Kit 237.

A covenant by a D.S. not to execute process of a certain Kind or description is void as against law.

Hob. 14.

A D.S. cannot delegate his own authority. It seems to be a first principle that an original authority may be delegated, but a derivative cannot.

4 Bac 442.

But a D.S. may require the assistance of persons, & in general every person is bound to assist him.

Co. Lit. 168. 4 Bac 442.

If a Sheff delegate to two persons either may execute the authority.

Sheriffs.

If the D.y is guilty of any neglect of duties the Shff may have an action against him The Shff generally takes a bond with surety from his D.y & in this case he brings his action on the bond. If there is no bond an action on the case lies.

1 Rol. Ab. 90. 4 Bac. 442.

Ca jailor is also a servant of the Shff - the Shff having the care of the jail ex officio -

4 Co. 34. 9 Co. 119. R. L. 1. 200

The Shff must confine his prisoners in the Common goal & in no other place, except for proper cause - There may be a temporary confinement in another place

Shff. must not carry prisoners & slaves without the voluntary consent of such prisoners - to ask & charge them with any summes for any thing but what they shall call for themselves - nor exact illegal fees - He shall permit the prisoner & send for any necessary things, without paying for such privilege -

R. L. 121.

Sheriffs: He must not confine felons & debtors together in one room but they must be kept seperate by & in distinct rooms.

R.L. 1.212. And shff offending against the provisions of this act forfeits his office & treble damages the party grieved. To be recovered by action of debt or information with costs of suit.

Rob. 202. Latch. 16. 1 Sid. 310. Salk. 400. If a shff confine a person except in the common goal he is guilty of false imprisonment & may be sued.

In case the goal or prison of any county is destroyed or ruinous unsafe, the judges of the C. Pleas or any two of them may by warrant fix upon the goal of some other county for the confinement of the county prisoners - which will from that time be the goal of the County to all intents & purposes until the goal shall be repaired. And the Court may modify annul their warrant, as occasion may require -

2 N.Y. 301 Sp. Ch. 09.

The Shff being ex officio Keep- Sheriffs.
er of the goal, he cannot be
arrested in a civil suit in
his own county for he might Stiles 465.
immediately liberate himself Kirb. 40.

If there is a criminal
process the Shff may be com-
pelled in another county,
as N.C. supposes, tho' no case
has been decided on this sub-
ject yet from the necessity
of the case there can be no
doubt of it -

When Sheriffs are liable
for the acts of their D.S. -

As Deputies are servants of 2 Burr. 802. 46
the Sheriff he is liable for their 5 Co: 99.
misconduct & neglect - 9 Co. 9 00.
1 Bent. 314

Deputy security given Stiles 460 -
to the Shff by the D.S. is valid
and binding in law -

As a general rule the Shff 2 Ld Ray. 157
is liable for all civil acts of Doug. 4
his deputy; but for his crim- 2 T.R. 15
inal acts he is not liable - 1 Bent. 23

Sheriffs.

But these acts of misconduct of the D.y must be official. For private acts the Shff is not liable.

1 Rob. 10. 94. Cro Cl: 175. 1 Leon 106.

It may be asked what are official acts? They are those which are done under color of his office.

4 Bac 442. 3 Will 309. 2 Bl R. 952. Doug. 42.

A D.y on an execution seizes the goods of B. it is held that the Shff is liable. tho' B. question it.

Cro. 403. Salk 191. Q. Dy. 603 5 Co. 89.

For mere breaches of duty the D.y is not liable at com law to be sued - but the Shff alone is liable to the party injured.

Cro. Eliz. 175. 743. 3 Mod. 321.

But for a tort of this Deputy committed in his official character both the Shff & Deputy are liable.

4 T.R. 120. 1 Dy. 607.

But the Shff is not liable for the defaults of a Special D.y appointed at the request of the Plaintiff.

2 Bl. 960. 1 Mod. 14. 5 Co. 72.

If after the death of the Shff & before another is appointed there is an escape - no one is liable.

2. 1. 206.

In N. Y. the Shff's bond may be proceeded on as the London Shff may take his plan.

Sheriffs.

Under the Law Merchant, the holder of a bill of exchange after having taken one indorser & discharged him, may prosecute another - but can have but one payment of his debt. 2 Bl. R. 1235. 4 T. R. 320. 2 Show. 401. Chit. on Bills 124.

It was formerly decided that if a sole Deft died in prison, the debt was extinguished - But this was never settled Law. It was always holden that if there were joint debtors, the other was not discharged. 15. S. 101. Hob. 52. Cro. C. 550. Cro. Jac. 135. 143. 6 Co. 66.

By Stat. of N.Y. if Deptor die in execution Plff may have new execution against his estate. Such new execution however is not to affect any estate bona fide sold for payment of debt after the judgt. R.L. 1. 392. 2 Bar. 354.

A bond given by the Debtor conditioned that he will be a true prisoner till the debt, fees & board are paid is void, for the Sheff is bound to keep the prisoner until the debt is paid together with his fees. But the board is a mere private agreement and the Sheff is not bound to board him. 10. Co. 100 b. Plow. 37. Hob. 14. 2 Wils. 351. 1 Root 150. Vid. 2. John. Ca. 239. cont.

In Conn. the Supreme court have decided the bond good except for the board.

The duties of Sheffs are particularly laid down by Stat. of N.Y. Vid. L.N. 4. S. 367. R.L. 1. 102. 03. 96. 137. 175. 392.

Contracts.

Many entire branches of this subject will be considered under other titles as Bailment &c.

A Contract as defined by Bl. Stone is an agreement between two or more persons, upon sufficient consideration, to do or not to do a particular thing. 2 Bl. Com. 4

Powell defines it, a transaction between two persons where both are bound to each other, or one is bound to the other. 1 Pow. C. J.

Mr. G. thinks neither of these definitions perfect.

The term contract at common law includes agreements as well executed as executory, as deeds, leases, gifts, grants &c. 1 Pow. C.

The requisites to every contract are,
1 Parties,
2 A mutual consent of those parties to some stipulation.
3 An obligation to be created or dissolved.

Mr. Powell in treating upon this subject with follows Powell a very able treatise. But he requires a commentator.

1st Absent of the parties as who may assent.

By the term assent is meant an agreement of the mind to do or not to do an obligation.

Assent is requisite in every 3 B.C. 442. contract & without assent there can be no contract.

As the assent of the parties is requisite to every contract a person non compos mentis or an idiot cannot contract. The reason is this they have no understanding.

All contracts not of record made by idiots or lunatics Co. 123. 126. at M. Lut. 21. at common law are not Rol. 720. binding & as Powell thinks so Show. P.C. 152. Pow. 11. 12. void. And he thinks that non est factum is the proper plea. This is disputed. Formerly this was held otherways. There has been a decision by C. J. Lee recognizing Powell's opinions.

In pursuance of the idea that an idiots contract is void, it has been decided, that a Surrender of an estate by a Lunatic, on which there is a contingent remainder in the remainderman may take advantage of it; therefore it must be void.

3 Mod. 296. 301. 1 Salk. 576. 1 Ld. Ray. 316. 2 Vent 190. Carth. 211. 1 Pow. 12.

Mr. G. thinks there is something embarassing in considering the contracts of Lunatics void, for it may not be for his interest to consider them void, for the rule was made for the benefit of the lunatic or idiot but Mr. G. thinks the Law is as Powell states it. And he grounds his opinion on the decisions respecting the surrender of a tenant.

2 Stra. 1104. Bul. N. P. 17. Co. Litt. 338. 1 Eq. D. 222.

When the word void was first made use of, it was not understood, either by Courts or the Legislature.

But tho' regularly contracts are not binding upon insane persons who have not compos mentis, yet such persons may acquire property,

by a derivative title, as by deed gift or devise, yet he must be absent & vest the property in those & whom it is given.

Powell says, in this case the law presumes absent where it is beneficial. But this is a very artificial reason; it is absurd & presume absent when the person has not the power of absent. N. C. thinks it would have been better & have given the Law dispenses with his absent.

Co. Lit. 26. 1 Kent. 203. 3 Bac. 84.

But tho' the Law dispenses with the absent from the necessity of the case, yet the lunatic during covering his understanding shall dispent. or if he recovers his sense & dies without absenting himself during insanity, his heir may dissent after his death.

Co. Lit. 2. Cow. 13. 2 Kent. 203.

But contracts made by an insane person for the purpose of alienating his property, are not within the above rules.

In a purchase of property the lunatic may on recovery assent or dissent to it. And so may his heirs, if he has not assented.

It is a rule that no man shall stultify himself. Cro E. 390. 662. 4 Co: 123. Litt tent 405. 1 Fonb. 41. Cont. Thr. 116. 3 Bac: Ab. 7. 4 Co. 124. 5

This rule is founded in reasons of policy to prevent fraud in persons affecting madness. 4 Co. 124. F.N.B. 202. Cro E. 390. Litt tent 405.

After the death of a lunatic or idiot, his representatives may avoid his contracts.

There are two modes by which a person non compos mentis may have his contracts avoided. The King as Parens Patriae may issue a writ of Scire facias, even during the party's life & avoid his contracts in fact. But the King cannot do this before the person is found insane. This office when found has relation to the commencement of the disability. Jenk. 40. 4 Co. 126. 8 Co. 170. 3 Bac: Ab. 10 Pow. 24.

The second mode is by a suit brot in Chancery for that purpose by the Attorney General or the Committee of the person. Here still a Conservator. In this case the Lunatic must not be made a party.

2 Ves: 414.
3 P.Wms 105.
3 Atk: 170.
1 Eq. Ca: ab: 209.
1 P.Wms 111

But if a suit is brot in Chancery to compel the performance of a Contract made while sane the Lunatic should be made a party with his Committee.

1 Ch: Ca: 159.
1 Vern. 20.

A Contract made by a Lunatic in a lucid interval is binding upon him. he then has both the physical & moral power of assenting.

1 Dic 203.
4 Co. 126. a.
2 Vn: 412: 414.

In N.Y. The Chancellor has power & decree & compel a specific performance of any bargain contract or agreement, made by any Lunatic in sound mind & direct the Committee of such Lunatic & do and execute all necessary acts for that purpose.

R. L: 210.

Tho' insane persons are not bound by contracts not of record, yet they are bound by Contracts of record. The reason is, there can not be a dispute on record cannot be disputed or unpeached. But in this case a Court of record will see that every thing is fair. 4 Co. 121. Co. Lit. 247. 10. Co. 42. 3 Bac. Ab.

When apparent inconsistancies are seldom inconvenient at Common Law.

An ideot is sometimes one that has no understanding from his infancy. The rule laid down in Bl. Com. Mr. Cy. J. N. Ab. 233. 3 Bac. Ab. 79.

Lord Coke supposes incorrect, that a person who could tell his age, count twenty &c is not an ideot. If the person cannot do this, it is good evidence that he is an ideot 1 Bl. Com. 304. 1 Inst. 247. 3. Bac. Ab. 4 Co. 125.

Intoxication tho operating as a temporary insanity, is not either in Law or equity, ground of relief, & voids a contract. This is upon reasons of policy. 3 P. Wms. 131. 1 Vez. 19. 1 Tomb. 62. 2 Swift 44.

There is one case contra, which Mr. G supposes the only one in the books.

Bul. N.P. 147.

But where fraud has been practised & procure the intoxication, it will vitiate the contract.

3 P.Wms 130. 1 Pow. 30.

This rule applies to a case of Chancery. It does not extend to persons of weak minds. Weakness of understanding is not per se a ground to avoid a contract.

1 Fonb. 56. 63: 65. 3 P.Wms 129. 1 Pow 30.

But the least fraud will vitiate the contract - and presumption of fraud is sufficient in this case.

3 P.Wms 129. 2 Pow. 31. 2 Pow. 220.

Upon this general principle that there must be assent, the contracts of infants are void. For this see tit: Parent & Child.

The infant however may contract for necessaries. He has no power of assenting (more) in any other case. Yet the law dispenses with assent, as wou[ld] for fraud in case of an advantageous bargains of Lunatics.

Pow. 92 to 59.

If a Shff has begun process before completion is removed he is at liberty to proceed and finish his business, the removal notwithstanding - Sheriffs.

Salk. 323.
Cro. J. 73.
Moor 517.
1 Rob. Ab. 89

Authority & duty of the Sheriff -

In England the Shff is a judicial as well as an executive & ministerial officer - Here he is only executive & ministerial -

4 Bac. 448.
1 Johns. 66.

The Shff is the first executive officer in the County as conservator of the peace - He is to apprehend traitors felons &c and is to defend the county against invasion.

1 Inst. 160.
1 Rol. Rep. 29.
1 Stat. Con. 38.
1 Bl. Com. 344

In these respects the Shff is an executive officer only - By which is meant one who executes the law without a command from any superior -

A ministerial officer is one who executes or enforces the law by command of a superior - As an executive officer he executes process.

4 Bac. 449
Bl Com 344
Now. 74
Dun 60

Sheriffs.

As the Sheriff has authority to execute process so he is bound to do it - If he does not he may be fined - And the party injured has a civil action against him - he Court he is liable for not returning a writ - In England & N.Y. he is also liable.

Doug. 446.
2 H. Bl. 293.
1 Bac: 50.
206 -

A known officer as the general D.y or Constable is not bound to shew his writ until he makes the arrest - Then he is bound if required -

9 Co. 69.
Cro J. 405.
Y. D. 604.
7 T. R. 187.

But a Special D.y or bailiff must produce his writ, if demanded, before the arrest.

4 Bac 452

A Sheriff or his D.y, where he is in the execution of the office may command the posse of the County and they are bound to assist -

Inst. 193.
453.

And he shall certify the Court the names of the resistors and favorers & they shall be attached & appear in that Court - and if convicted they shall be fined & imprisoned.

P. L. 209.

A Sheriff is not at liberty to break the outer door or window & take a man or his property. His house is called his castle. It is said in some of the old books that even in this case the arrest is good - this is not generally true - tho in some cases it may be held good at the discretion of the court.

This privilege of the mansion house being founded in injustice between the parties, it is construed strictly & the rule extends only to outer doors & windows.

This privilege extends only to the owner or person residing in the house or the family. A stranger or his goods are not protected.

Nor does the rule extend to criminal cases.

The rule is the same on mesne process for debts & Rent & the peace & for forcible entry and detainer, these being criminal in form.

Sheriffs.
5 Co. 91. Cro. El. 909. Hob. 62.
Cowp. 1.
5 Co. 92. 4 Bl. Com 434
2 Bl. Rep. 812
Cowp. 1.
Hob. 62 263 - Cow. 6.
5 Co. 91 Sid. 106
5 Co. 91.
12 Co. 131. Moor 606 4 Bac 454

Sheriffs.

And when a person known to have committed a felony is pursued either with or without warrant - he may be arrested by breaking open doors -

But it cannot be done without warrant upon suspicion only unless it turn out that the person is guilty -

2 Hawk. 96.

Any person may break a mansion to suppress an affray -

1 Roll. 65.

On a writ of Fa: fa: the Sheriff may break open doors, tho' a civil process - for it is absolutely necessary in order to give possession.

Co. Lit. 161. Bac. Abr. 455.

Upon any civil process the doors of a barn may be broken - And Mr. C. supposes a store may be, unless no one sleeps in it - If any person slept in it, doubtful!

Bac. Abr. 52. Co. Lit. 555.

If a Sheriff, bailiff, is locked in the Sheriff may break the door to release him.

Rol. Rep. 150. Bac. Abr. 5-4. Mod. 173.

If a person escapes, doors may be broken to retake him -

N.C. Rep. 223. Ld. P. 605.

If a person is illegally arrested and another lawful one is made, the latter is good provided there is no collusion in the case.

Sheriffs.

By a Stat. of England as well as one of our own. an arrest on Sunday except for treason, felony or breach of the peace, is void and any person serving the process is liable for damages at the suit of the party grieved. 5 Rob. 70. R 2. 1. 22.

But a person who has escaped may be retaken on a Sunday. Ray 102 0. 6 Mod. 9. 253. 2 Bac 22.

The Courts will always dismiss a person arrested on Sunday on motion of the party. 6 Mod. 9.

Sheriffs.

Law of Escapes.

Where a person under Lawful arrest & restrained of his liberty either voluntarily or otherwise evades such restraint, & is suffered to go at large, thereby making his escape - this was ón is called an escape - It is essential to an escape that there be a previous legal arrest.

Bac 233.

2 Hen P. 259.
3 Co. D. 607.
Comp. 65.

What is a legal arrest?

Every arrest to be Lawful must be made pursuant to lawful authority - By this is not to be understood that there must be a Lawful warrant - for an arrest may be Lawful without warrant in certain cases.

The rule of common Law is this. If the Court from whose the writ is issued has jurisdiction of the subject matter the arrest is good.

Hoon 274.
Sp D. 391.
233. 6 Eq.
Will 904.
Co. 141. B.
Co. 64.
Ina. 509.

But there must be nothing illegal in the mode of making the arrest.

If the Court has not jurisdiction of the subject matter, the process is void & consequently the arrest

But in Connecticut the Officer is not liable unless the process appears void on the face of it. But if it is void on the face of it he is liable. Sheriff's Kir. 110. 102 Swift. 337.

There are certain cases when tho' the Court has jurisdiction yet the process may be void - as if the process is not to be returned at the next succeeding term, if there is time power known before this Court it's - 3 Will 84

In N.Y. process except by original, if issues in term may be tested any day in that term & be returnable any day in the same term or the next term - If issued in vacation, may be tested any day in the preceding term & be returnable any day in the next - R.L. 1. 318 Ibid. 390

Process in the Mayors Court can not be tested & made returnable in the same term - Ibid.

As a general rule irregular process is void, erroneous process it not - Gh Dig - 320. 600. Cas Ta. 140 Cro C. 140 1 Will 341. 1 Root. 315. Salk 273

Sheriffs.

This last class of cases can hardly be said to be an exception to the general rule. As irregular proceeds may be said to be new proceds.

The arrest to constitute an escape must be actual. Words will not be an arrest. There must be a touching of the body or what is tantamount to it, as when the person submits or is immediately in the power of the officer.

4 D. 604. N.C. 62. 14 Ga. 506.

Where an officer has made an arrest on one writ & another is delivered to him, the Defendt is in custody also on the last writ.

Co. Dig. Talk 237.

In all civil cases the arrest must be made by virtue of a lawful warrant.

Saw. 64. 4 D. 604.

An arrest must be made by authority of the officer to whom the writ is directed, but it need not be his hand which makes the arrest. The officer should be in company with the person making the arrest tho' he need not be in sight. It is sufficient if he is in pursuit.

Saw. 65. Mod. 211. 4 D. 604.

Sheriffs.

If the goaler permits a person committed on a Sunday, & escapes, he is not liable for the arrest was void. 6 Mod. 95. Salk. 78. Cro. 2. 605.

If the officer make an arrest breaking outer doors or windows it will not be an escape in the officer to let him go at large. Cow. 9.

If the officer has had an opportunity of making an arrest & has not done it, he is liable to it is no escape. 2 Mod. 24. L'Ray 331. 10 Mod. 255. 257.

Escapes are of two kinds voluntary & negligent. 3 Bl. Com. 415

Every person committed to prison must be kept in close custody. If the prisoner is suffered to go at large a moment it is an escape. 3 Co. 44. 1 Plow. 36. 1 Rol. 806.

A voluntary escape is one with the consent of the goaler or other officer having the custody of the prisoner. A negligent escape is one without such consent. 3 Bl. C. 415.

If an officer lets to bail when the crime is not bailable he is guilty of an escape. 1 Rol. 806. 3 Co. 44.

Sheriffs.

If a prisoner is arrested on final process the rule is the same for him no bail is admissible except to indemnify the sheriff for the limits.

2 T.R. 176.
1 Bro. Pl. 26.

Criminals must be confined within the walls of the prison.

Prisoners in custody on civil process only must be permitted to go at large within the gaol liberty on tendering bond to the sheriff with surety in double the amount conditioned to be a true & faithful prisoner & not to go without the liberties - This however does not exonerate the sheriff in case of an escape -

R.L. 1. 960.

It has once been decided only that when the sheriff let out a prisoner on Hab. cor. ad test. he was guilty of a voluntary escape. This has been overruled & decided not to be law. But it is settled that if the officer grants the prisoner unreasonable liberty, he is liable for an escape.

1 Sid. 13.
3 N.P. 92
1 Root 72.
3 Kir 305.
2 Ray 741.
3 Salk. 99. 100.
Cro. Car. 14.
4 Mod. 76.

By Stat. N.Y. In case of Hab. Corp. cause & return on the writ that prisoner is charged in execution, he must be remanded without bail, until satisfaction for Debt -

R.L. 1. 212.

An officer having made an escape must commit the Deft. in a reasonable time or he is guilty of a voluntary escape. Sheriffs. 1 Rob. 24 2 T. R. 170.

If a Bff marries a woman committed on execution he is guilty of a voluntary escape for he cannot confine his wife. Raw.

If the Bff appoints a prisoner a turnkey he is guilty of a voluntary escape - 1 Rad. 311. Esp. 106.

If the prisoner having the goal liberties manifest a disposition to escape he should be committed within the walls - If he is not the goaler is guilty of a voluntary escape -

The Bff may at any time, if he suspects the bail an insufficient, commit the prisoner until other good bail for the liberties be offered. The bail must be an inhabitant & freeholder within the county - R. 2. 1. 360

The Bff is not deemed to incur an escape if the prisoner upon civil process only go at large within the limits of the goal liberties - Ibid

Sheriffs.

Negligent Escapes.

If the prisoner escape by virtue of lawful process or without consent it is not a negligent escape.

F. N. B. 130. Cro. Jas. 609.

For the purpose of shewing that the officer is liable, it is necessary to shew that the writ was delivered to him. For this purpose his return is sufficient.

Cow. 63.

There is a great difference as to the liability of the officer on mesne & final process. The distinctions will be taken

If the prisoner arrested on final process be suffered to go at large a moment, the officer is liable for an escape.

2 T. R. 172. Cro. 606. 3 Bl. C. 415.

At Com. Law the person arrested must be forthcoming at the return of the mesne process. Here he must be forthcoming in the life of the execution. If he does that it is sufficient on final process.

There is a distinction between mesne & final process with regard to bail.

2 T. R. 172

Sheriffs.

If the Defr is not then forthcoming the Sheriff is liable for an escape on mesne process. 2 Rol. Abr. 90. 807.

If the goaler permit a prisoner on mesne process to go at large he is liable for a voluntary escape. And the return of the prisoner does not bar the action. 2 Will. 294. 2 Will. 294. 1 Rol. 807. Skin. 562. Salk. 271.

Nor does the Plaintiff by proceeding to Outlawry against the person after the escape bar his action against the Sheriff or goaler. 2 Will. 294.

For an escape on mesne process the remedy against the Sheriff is an action on the case. The damage is presumed two. & damage must be proved. & the Plff must prove there was a legal claim existing. 2. T. R. 129. 4 T. R. 611. Cro. E. 17. 2 Str. 1087. 2 Will. 294.

For an escape on final process the Plff may have an action of Debt against the Sheriff. who is answerable for the debt & damages for which the person was arrested. R. 2. 1. 212. 2 H. Bl. 110. Bl. Rep. 104. 2 T. R. 129. 132. Str. 1087.

Sheriffs.

The common law remedy by an action on the case, which is not taken away by this statute - and this is generally the best action - In an action of debt under the statute, Plff can only recover the precise amount of the original judgt without interest - When case is brought the jury may allow interest in the assessment of the damages so as to give Plff all he has lost by the escape -

It has been objected that the damages are presumptive on an escape on mesne process - By this is meant nothing more than that the damages are unliquidated - It is at the option of the jury

2 T.R. 129. 2 Ep. D. 609. If the jury give as much as the debt the Plff looses his remedy vs the debtor - if not, his remedy continues -

But if an action of debt is brought the jury are bound to give the whole sum of debt and costs -

Cohens. 454. Rawson vs Dole -

If a person arrested on mesne process & not actually committed to prison, is rescued from the officer, the officer is not liable. The distinction between the case of final process is that in the latter case he may always have the posse comitatus

Sheriffs.

3 Bl. C. 416. Cro J. 419. Cro C. 873. Cyc. D. 610. 6 Com D. 232.

But after commitment the Sheff is not excused for an escape the rescue be by public enemies or unavoidable accident.

1 Co. 94 A. 1 Sta 402. 1 Rol. 800. 2 Atk. 113. 1 T. R. 709. 1 Rol. Ab. 800

Where there is a rescue the Plff may proceed either against the Sheff or the rescuers. or he can retake the person escaped by new execution, either fieri fa ca: sa at his pleasure

Cyc. Dig. 659. 610. 6 Mod. 211. 2 Ld Ray. 77. a. 109. Hut. 90. R. L. 1. 213.

It is said that the Plff may have an action of debt or case against the rescuers, but he cannot have trespass in either case.

1 Roll. 100. Cro J. 406.

If the Plff recover his whole debt of the rescuers he has no remedy against the original debtor.

Cyc. Dig. 65 7. 659. 6 Mod. 211.

Sheriffs.

When there is an escape on mesne process returned by the Shff. the Shff may sue on the false return & prove it to be false.

4 Bac 404. 2 co C. 70b. 1 Dier 212. Comb. 295. 1 Salk. 224. 2 Dr. 175.

But a return of rescue cannot be disputed.

Stat. 98. 4 Rob. 180. Cro Car. 77 or 180.

The Shff may maintain an action against rescuers when he is liable to the Pltff. But not on mesne process.

Eq. b. 600. Stra. 402.

The rule is the same when the Shff takes out a prisoner on hab. cor.

5 Co. 62 b. 2 Will 295.

A prisoner may be taken on an escape warrant on a voluntary escape.

2 Lutw. Ca: 3. 3 Bl. Co. 415. 3 Co. 52. 1 Wils. 330. 2 T.R. 176.

If the Pltff permits a voluntary escape he cannot retake the person or sue him.

On conviction of voluntary escape the Shff. forfeits £1250. & his office & is never after eligible to the same office.

1 Bro. Ca: 196. 2 Rals. 25. 10 Ca. 100 B.

A bond given to Shff to save him harmless from a voluntary escape is void as against law.

Cro E. 309. Eq. D. 613.

Aliter for a negligent escape. The bailiff however cannot sue

Sheriffs.

When there is a negligent escape the Sh'ff may retake the prisoner or bring an action on the case, immediately for the escape. Cro C. 234. 13 Co D. 112.

It has been decided in Con't. that when an officer pursued a prisoner into another State & took him it was a legal arrest. 1 Root. 107.

If a prisoner escapes on criminal process &c. he is punished by fine &c. 2 Haw. P.C. 122, 123. 4 Bl. C. 129.

If an officer permits a prisoner on criminal process to escape he shall be punished by fine & imprisonment & answer the party grieved, if any there be. RL. 1. 210

In England he is guilty as accessory to the offence. 4 Bl. C. 130. 1 H. P.C. 590. 2 Hawk 134.

If a Sh'ff in consequence of a negligent escape is compelled to pay the debt he may maintain indebt. &c. for money paid &c. for the original debtor.

If in this case the prisoner is retaken before action brot. agst. the Sh'ff. for the escape. the Sh'ff. is discharged. 8 Ina 900. 10 Wend. 211. 217. 3 Co. 44. 1 Root. 106.

The Sh'ff must plead a retaking specially, or give notice under gen. issue & oath must be taken by him that the escape was without his consent & knowledge. R. L. 1. 213.

Sheriffs.

If the oath be false, on conviction the Shff forfeits £12 50 -

In Con^t^ he stat - he need not plead it specially -

If an action is brot before returning the prisoner, the Shff is not discharged -

Cro E. 657. Stra. 873. 1 Rol 800. 2 Co. 4 45^2^ Cyc. 611.

It has lately been decided that a voluntary return of the prisoner is the same as a recaption -

2 T.R. 126 Com R. 534 1 B & P. 413.

It is said in some of the books that the Shff has no right to discharge a person from prison on his paying the Shff. Debt - Cro. Car. 404. 2 Bac: 240. 1 Mod. 194 2 Mod - 225. 336. for the Law gives the Shff no such authority - But W. G - questions the rule -

An escape of a prisoner from the goal liberties is a negligent one & the Shff may save himself by recaption before action brot -

Tho' the Shff is discharged by recaption or voluntary return, yet he may sue on the bonds, but will recover only nominal damages - Tho after the return of the prisoner the Shff's liability is at an end -

1 Rol. 120.

If the claim agt Shff is barred by the Stat. of limitations, he will recover only nominal damages -

And in this case if the Shff recovers of the bond-man, he may be relieved by an audita querela. Sheriffs. 1 Root. 151.

In declaring for an escape, the Plff under a count for a voluntary escape, may recover a negligent one & support the action - Or count the Shff may plead anything that will justify either & the Plff may answer any thing wrong in his replications - 1 Dcut. 211. 217. 2 Bac. 240. 2 T.R. 126.

For a voluntary escape either the Shff or his Dft may be sued - Ep. 603. Coup. 203.

If after a negligent escape the judgt is reversed before the Shff has plead to the action, he may plead nul tiel record - But if judgt is obtained against him before the original judgment is reversed, he has lost his plea. Tho' M.G. supposes the Shff might be relieved by audita querela - 8 Co. 142 b. Hob. 209. 3 Mod. 325. 8 Co. 143. B.

The Shff is liable for a false return & this may be either to the Dft or party grieved - or to the Plaintiff - Ep. 616. 1 Sha. 650. Co. B. 29.

And in Com. the Dft may appear and falsify the return - Ep. 611. 1 Will. 336.

Sheriffs.

Miscellaneous Rules.

If a creditor voluntarily discharges a prisoner, he can never retake him, or inforce the collection in any other way. This body is a pledge & the only one and where the pledge is given up the remedy is lost.

7 T.R. 420. Str. 653. 1 T.R. 557. 6 T.R. 525. 8 T.R. 123.

The original propriety of this rule may be questionable, but it has been established for ages.

If the Plff discharge the prisoner on a promise or contract he cannot rely on that promise or contract.

Burr. 2402. 1 T.R. 557. 6 T.R. 525. 7 T.R. 420. 2 East. 243.

A parol promise in this case would be good. The rule is the same where there is any informality in the contract so as to defeat it.

1 T.R. 557. 6 T.R. 526.

This rule is so rigidly adhered to that if the Defr agrees that he will abide by the contract, or be taken on execution, the last agreement is void.

1 Bro. Pl. 224. 2 East. 243.

And a bond given by the prisoner & a surety conditioned that he will submit to be taken on execution is void. for the party can not be bound himself to this than to be taken.

If two joint debtors are in prison the discharge of one is a discharge of both.

1 Ford. 93. 1 Salk. 574. 4 Mod. Ray 690. 2 Ld. Ca. 551

Some Covenants are also incapable of contracting. These covenants are regularly void. This not for the want of [illegible] but of moral power (Vid. Baron & Feme) 1 Pow. 59 &c.

A trustee may bind his cestui in trust. But the grantee must not know of cestui que trust, if he does the contract will not be binding. 1 Pow. 112. 1 T.R. 735. 7 T.R. 3. 47. 663. 15 T.R. 515. 1 Ken. 136 334: 44

The doctrine is treated at length in Powell on Mortgages.

An ancestor tenant in fee may bind his heirs by his own agreement, & they may be compelled in Chancery to fulfil it. 2 Ver. 213. 1 Pow. 115. Vid also Pow. Mort.

An agreement to bind the heir good where at the time of making it, it was apparently beneficial to him. 4 Bac: Ab 485.

A mother acting as administrating may bind the children when cases depend upon their peculiar circumstances and an exception to the general rule. 1 Ver. 211.

Contracts of a woman before marriage are binding on her husband. 2 Ver. 440. 10. Mod. 160. 203. 1 Rol. A

Executors and Administrators are bound without being named, where they would be
1 P.W. 197. bound if named.

3 Atk. 277. The attorney may bind his
1 Br. Pa. Cas. 547. Client when he is not himself
Eq. Ca. Abi. bound.

Where an attorney makes
1 Pow. 12 n. a contract for his Client, un-
2 Ves. 127. thought he is himself bound.

If one joint tenant make a contract to alien his joint tenancy & dies before execution, the Co-tenant is not bound to execute, because his right is prior to the person. But if the agreement amount to a covenance of this joint tenancy it will be enforced in equity.

Quere? Is not every agreement to alienate amount to a covenance in equity?

Mr. Gould inclines to think
1 Pow. Mo. 63. that it is but has given the
Prec. Eq. 634. rule as laid down by Powell.
2 Lit. 59 n.

the opinion of another, even in matter of law, the agreement or compromise was set aside in the Court of Chancery.

2 Pow. 196. Mosley Rep. 36.

This is a case sui generis. There is a distinction however between this case & the former. In the latter both were deceived by another person.

If upon any doubtful point between two parties, a contract is made, neither of the parties can rescind the contract. This may be exemplified by contracts of wagers. It is not so if the fact or event is certain, provided it is not known to the parties, they are bound.

Cow. 37. 1 Pow. 146.

If on the purchase of an estate the purchaser is under an erroneous misrepresentation which furnishes the principal motive for the purchase, the contract is not binding.

But if the misrepresentation is immaterial the contract is good. But damages may be recovered. Or there may be an abatement according to the value.

1 Pow. 147. 2 Ib. 196. 201. 1 Vez. 402. 2 Vez. 195. 1 Vez. 82.

Subject of Contracts.

Under this head we can & ought a material distinction between a contract executed, and executory. Blackstone says a contract exec 2 Bl. C. 443. is a chose in possession, an executory a chose in action.

Contracts executed.

It is an established maxim of law that no person can convey a thing in which he has no 2 Plow 432 Dow 152 Hob 132. 1 Inst 309 B. actual or potential interest at the time of the contract. No man can convey what is not his own.

If A. lease to B. the lands of another, the contract is void, and Cp. D. 306. 233. 1 Inst 41 B. 3 Leo. 14 b the lessee on a plea for rent may deny the right of the lessor to the land.

It is said however that if the lease is by indenture this plea Stra 817. 7 T.R. 537. Cp. 233. 306. is not admitted.

A man cannot grant that which he has only a inchoate right, but he may convey Plow: 432. 1 Dow 154. Dyer. 221. Fern Rep 441. 4 T.R. 246 1 Dow 135. 3 T.R. 88. that which he is potentially owner or possessor.

ion is said to be potentially own
er of a thing which is accessory
& another of which he is actual
owner - Therefore one may leave 1 Bob. 132.
land in future &c 1 Pow. 136.

Rights not vested within actually
& potentially may be the subject
of an executory contract -

An executory contract is 1 Pow. 150
one that is only preparatory
to the principal contract -

A man may bind himself to
comply at a future period
although he has no legal title
at the time of the contract.
But in this case if no future
act is to be done & can by its
effect it is void, for he has
neither an actual nor potential interest -

If the contract is consum- 1 Pow. 159.
mated it is executed and not 232.
executory - 2 Bl. C. 443

If one of two joint tenants make
a deed of the whole & the co-tenant
afterwards dies, only one moi-
ty of the land will pass, because
the grantor had not the interest
at the time, tho' afterwards acqui-
red by the death of the co-tenant -

It has been decided in Connecticut that if a man makes a deed of land, of which he is not the owner, & afterwards purchases it, he is estopped from saying he had no title at the time.

1 Root 222.
2 Bl. R. 795.

The rule is the same at common law respecting leases. for if one make a lease of land of which he is not the owner & after purchases, it shall inure to the Lessee.

Salk 271.

This is a case when he has neither an actual or potential interest. Yet the law, under these circumstances, says the grantor shall not take advantage of his own wrong.

Pow. M. 495.
2 Roy. 729.
1 Salk. 138.
1 Lev. 235.
3 Mod. 226.

The rule is the same in mortgages. If A. mortgage land of which he is not the owner at the time of the mortgage, and afterwards acquires the land it shall inure to the benefit of the mortgagee.

2 Ves. 11.
Pow. M. 97.
T. R. 780.

In case of a freehold, where the grantor has no actual or potential interest, if he afterwards acquires it, does it pass to the grantee?

W. G. thinks the common law rule is that it does not pass the estate. This rule applies to leases for life and all freehold estates.

If there is a distinction between a freehold and a chattle interest it is probably founded on the idea that there must be livery of seizin to pass a freehold.

1 Pow. 160. Litt. Cont. 444. 1 Inst. 265. 3 T.R. 370.

No right can be acquired and of course no obligation can exist to perform a contract unless 1 Pow. 160. 1 Rol. ab. 420. 1 Inst. 206.

actually impossible. For here it is clear neither of the parties expects performance.

The Law distinguishes between those things which are stipulated to be done, which are naturally, & those which are physically impossible. In the latter case the contract is binding. For the party is always bound, unless the performance is naturally or morally impossible.

In the latter case however the Court of Chancery will not decree a Specific performance but will award damages.

Mr. G thinks the decisions putting the geometrical progression, in the case of the horse nails they and the horse, that it was not agreeable to principles. He thinks such contracts ought to be void on the ground of fraud.

1 Vent. 269. 3 Mod. 205. 1 Lev. 111 2 Ray 1164. 2 Keg. 155

As to the rule of damages, see Strange 405.

But a contract is not void on the ground of an impossible performance, unless it is strictly so. It makes no difference how remote the possibility in executory contracts.

1 Pow. 163.

If one covenants expressly to do a thing and is prevented by inevitable accident it is no excuse for him. If he intends to be exonerated from these accidents, he should provide for them. The covenant is absolute & he must answer in damages.

Bun. 1639. Fonb. 369.

A contract physically impossible to be performed is void, & the thing must also be morally possible, by which is meant legal All contracts against law, or encouraging any thing unlawful are void. 1 Pow. 102.

Transactions may be unlawful either in a proper sense or improper, as Powell improperly expresses it.

Under the head of Contracts illegal in a proper sense, are 1 P.W. 109.
those either mala prohibita or mala in se.

Those of the latter class are those against the law 1 Pow. 156
of nature & are all void.

An agreement to pay A.B. a sum of money to kill another 1 Pow. 103
is void. 1 Fonb. 23
Comp. 39.

Contracts are illegal in a proper sense, when they have 2 Inst. 206
something in view against 1 Pow. 166
the law of the land or the municipal law.

A contract may be void
1st as being against the pub:
lic welfare or national po
licy -
Cowp. 39. 2d - As being against some prin
W. Bl: 922. ciple of the common law.
3 T.R. 17.
2 Vill 341.
7 T.R. 543. 3d - As being against some pub
8 T.R. 99. lic statute -
1 BPL 272.

In the first place there ca
Hob. 211. contracts may be against the law
Ray 292. of the land - 1st as being contra
Cro El: 892 ry to the public welfare. thus
1 Sid. 303.
Mla - 67. all restrictions of trade are
void, as any mechanical
busines is beneficial.

1 Pow. 101. The rule is the same when
Moog 115. there is a limited restriction
Cro Jac 596.
1 Inst. 206.
10 Mo. 101. The rule is the same as
7 T.R. 543. to the occupation of the land
owners -
1 Co. 53.
1 Pow 167.

Cro J. 596. But an agreement not to ex
2 Bull. 136. ercise a trade in a certain
Cro 172. place is good - But it is not
Cro 739. good unless founded on sufficient
P. Wm 192. consideration - And he who claim
10 Mod. 27. must prove the consideration -
Q.S - 130. This is contrary to the gen[eral] rule -

To give effect to such a contract it is not necessary that the party is of the description restricted at the time of making the contract. 1 Pr. Wms. 192. 1 Bow. 169.

A contract to uphold maintainance is void. Carth. 229. 2 Inst. 212. 4 H.C. 135.

A penal bond taken by the Sheriff to secure his fees is void the reason why a penal bond in this case is void & not in others is, that persons from whom Sheriffs fees are due are generally embarrassed & it would promote oppression. Penalties are never recovered but damages. And in England a writ may be had in Chancery. 10 Mod. 15. 1 Pr. Wms. 193. 172.

Upon the general principle, a contract with an alien enemy is void, as against the public welfare. For it is considered as dangerous to have communication with public enemies. 1 T.R. 95. 3 T.R. 548. 1 Rol. Ab. 17.

An insurance upon the property of the enemy is void upon the same principle. 4 T.R. 540. 6 T.R. 35. 1 Bos. & P. 345. 1 Park. 95. 473.

Ransom contracts however are binding, made by Officers of ships for the relief of prisoners - The rule is founded upon the law of nations, and enforced by the municipal law.

1 Bl. Rep 563. 3 Burr. 1794.

When there is a hostage left in pledge and retaken, the contract is not at an end - And the rule is the same if the hostage die; for the pledge being taken away does not destroy the debt or contract.

1 Bl. R. 563. Doug. 619.

No actions will not lie to recover back the proceeds of an illegal contract, though the money arising from it, has been received by the defendant.

2 Caines 147.

Contracts, continued
by Judge Reeve.

It has been determined in Connecticut that, in case of a sale of articles of no value, and there is ignorance on both sides, the loss must fall on the vendee. This is supposing a case where there is no fraud on either side. In N. Y. it has been decided that a forged bill, or note, or one of no value is no payment and that the party may treat it as a nullity and resort to the original contract. Markle v Catlin 4 Johns. 455

Contracts not binding by reason of defects in themselves.

Contracts impossible to be performed are void as has been mentioned. But there must be a physical impossibility. And no contract which cannot be performed by reason of the peculiar circumstances of the party will be deemed to be specifically performed.

an impossibility by act of Law will not generally excuse.

Where there is a conveyance of property with a subsequent condition impossible to be performed, the property vests, and the condition is void.

A bond upon condition of the performance of an impossible thing is good by the law of England. Judge Reeve does not approve of this principle. In the case of the bond the condition & bond itself are considered as seperate the bond as being good. and the condition void.

Illegal Contracts.

A promise to do or pay for an unlawful act is void.

It makes no difference whether the contracts are contrary to the immutable laws of God or against Statutes or the Common law. If they are repugnant to the rule of right of society or against sound policy they are void. Hobs. 60 12 Co. 100

A promise to a Sheriff to suffer an escape is void. 10 Co: 75. 103 Cro E. 199. Cow: 39.

Contracts tending to encourage anything unlawful or to induce a breach of the law is of duty are void.

Contracts which tend to ~~ruin~~ the feelings of third persons & not beneficial to the parties contracting are void. Cow: 79. 735

Marriage brocage bonds, as they are called, for the purpose of procuring marriages are void in chancery tho good in law.

How may the Defendant avoid illegal contracts?

When the contract is illegal on the face of it, it may be avoided by demurrer. If not, parol proof may be admitted to shew that it was illegal.

You may always attack a written instrument & shew its turpitude.

Exceptions to the general rule.

The rule in illegal contracts is, that the Law will leave the parties to themselves & not aid them. Therefore where money has been paid on an illegal contract it cannot be recovered back.

There are cases however where persons are indemnified from illegal acts. But these are always cases, where the person supposes he is doing a lawful act, or is ignorant that it is an unlawful act.

Dut. 53
2 Vol. 652.

Upon the subject that money cannot be recovered back on an illegal contract, there is an interesting distinction.

There are Statutes to protect the weak against the strong. When the parties are not in pari delicto. One party may in certain cases recover back the money as illegal contract. If in case of a bankrupt applying to a creditor & signs a certificate & the creditor exacts money it may be recovered back.

There is one rule which I.R. supposes there is not much policy in, & this that when the money is paid for an act not done which act is illegal. Even if it is paid the contract is not executed, the money may be recovered back. This may be a means to do illegal contracts, in order to obtain the money. The question has never been decided in Court. But the rule is as above stated.

Doug. 670
Bun: 1012
Comp. 790
Doug. 460-47

Doug. 453

When merchants in Co. enter into an illegal contract, and one of the partners pays the money on the illegal contract in this case if the money is paid with the privity of the other partner it may be recovered otherwise not.

3 Dum 410.

Usurious Contracts.

At common law no interest was taken. It is made lawful to take interest but there is a penalty for taking more.

There are two clauses in the English statute, one makes the instrument reserving more than legal interest void. The other inflicts a penalty on those who receive more than legal interest and any person may sue upon the Statute.

R.L. 57. The Statute of N.Y. has no penalty but declares all securities for the payment of more than seven per cent. utterly void. By the 2d sec: Payment of usury may be recovered back, by the party paying it within one year after such payment.

If the person praying more than lawful interest do not within one year bona fide & without covin or collusion do not prosecute, then any person may prosecute - And one moiety of the fine recovered goes to the person prosecuting the other to the poor of the town - R.L. 1.60.

By the 5th Sec: Persons charged with usury may be compelled to answer upon oath in the Court of Chancery - Ibid. 60.

And the person repaying, is acquitted & discharged from all further punishment or penalty -

When a premium is given at the time, it is deemed too much & destroys the bond. Bulk. 17.

It is very difficult to evade the law of usury - It takes but few very thing -

It has been decided by the S.C. of Mass in Conn. that a parol promise to pay more than legal interest vitiates the bond to which it is united - J.R. says this question has been agitated in England, but no case is reported in the books -

Under the English Statute
reserving to himself does not
incur the penalties - but
merely makes the instru-
ment void - Illegal interest
must be received in order to
incur the penalty - Then when
the bond is void
and the penalty also incurred
To render the contract
void it must be a corrupt
agreement -

5 Bac 412.
ibid 413.
Cro E. 201.
1 Sa 294
2 Mod 307.
1 Ro 247.
2 Co E. 501.
Cro J. 577.
2 Vent. 93.

Renewing an usurious con-
tract does not destroy the
usury, unless it is renewed to
some person other than he
who first took the usury
or his representatives - When
it is renewed to a third per-
the usury is purged -

Moor 757.

It has been questioned whether
a counter bond to indemnify
against an usurious contract
can be avoided, when a per-
has signed just a contract to
oblige another - P.R. thinks it
ought not to be so considered

Moor 762.

As to distinctions what is usury
see Moor 398. Cro J. 509 -

is settled that expectation of gratuity does not render a contract usurious - But the receiving such gratuity renders it so - 1 Vern 240.

A penalty upon non payment of a note is not usurious. The reason is that the penalty depends upon a contingency. There are cases, which are not usurious altho' more than legal interest has been received, as when there is a considerable risk run upon the principle - But the hazard must be bona fide & not colourable merely - Whether a real or colourable hazard must be determined by the times - 1 Atk 301 Cro E. 643 7 Mod 41. 2 Burr 1204 Cro J. 209. 500.

Vid L^d Chesterfield's case reported in 1 Atk 301. and in Vez. Jun 1 Brown & where are a number of modern cases cited - Wood 510. 1 Vez 164. 1 Wills 390 & in Blk: Burrows reports, Burrow and Hardy -

Mistake, as has been observed will not make a contract usurious; there must be a corrupt agreement.

A contract for compound interest is not usurious, but more than legal interest cannot be recovered. This however is founded in policy not in justice and even the policy is doubtful. It is designed to guard incautious & negligent people, which is generally the character of borrowers of money.

The mode of calculating interest is very different in different states. The first rule seems to be that of giving simple interest annually but not so as to give any compound interest.

The following is the proper mode. When part of an obligation is paid, calculate the interest of the whole obligation till the time of payment, then subtract the money paid from the whole sum, applying the payment to discharge the interest. There was formerly a very erroneous mode of casting

How may an assent be given?

Assent is either express or implied --

Express assent may be either 1 Pow. 131.
precedent, concomitant or subsequent -

A tacit or implied assent may arise in several ways, in silence or inaction -

If the first mortgagee is present but when a second mortgage is made of the same premises, & is silent, he looses his priority - 2 Ves: 151. 10 Ves: 392. 1 Ves 374. 1 Eq. 6. 1 Dick: Ch. 35.

Upon the same principle, a first Lessee, who is present at the execution of a second lease, & is silent, looses his priority - Pow. Mo: 108. 1 Eq. ca. ab. 35. 2 Va: 150. 23.

And an assent in this case is bound - But as Mr. G. supposes in the ground of fraud - 1 Pow. 134. Barnad: 10

It has been holden that a first mortgagee being a witness to a second deed of mortgage, is prima facie evidence of an implied assent; but this has been overruled by L. Hardr. 1 Pow. 134. Pow. Mo: 1067. 1 Eq. 6. 1 Dick: Ch. 95.

To raise this implied agreement it is necessary that he know that his claim interferes, and 1 Pow. 134. that his silence be voluntary.

Upon the same general principle it has been holden, that the holder of a note which has been dishonored requires of notice of the indorser, he relies on the maker & cannot resort to the indorser. In case of a bill of exchange protested, he must give notice to the maker. What is reasonable notice 1 T.R. 167. a question of fact in the first instance & the law decides on facts.

An indorsed note resembles 1 Pow 135. a bill of exchange. Doug. 654. Chitty on bills 90. 122. 124. 202. And in general the law will raise a tacit agreement where it is necessary to carry into effect the contract. As if one lets a 2 Bl. R. 35. chamber there is an implied Peake 93. agreement that the party shall have 1 Mod. 56. liberty to enter it.

And there is one species of agreement 3 Burr. 1011. 1 Bl. R. 165. annexed to all contracts, that if 7 T.R. 94. they do not fulfil them, he will pay damages 1 Pow. 137.

And if one person usually employs another & trade on trust certainly assents & any contracts of the kind made by such person.

In every conveyance, deed, gift &c there is a tacit assent & favor of the party to whom it is given, but he accepts of the deed gift &c. In this case it is supposed & the advantageous & the grantee. And wherever a contract is prima facie beneficial, there is an implied assent. 1 Pow. 130.

1 Pow. 139.

Where a bill of exchange is paid for the honor of the drawer, there is a tacit agreement on the part of the drawer to reimburse the drawee. Chitty 103. 3 Burr. 1674

Where a woman contracts for necessaries, the husband is said to tacitly assent (Vid. Bac: Ab: Feme).

On sale of personal property there is an implied agreement that the seller is the owner. Esp. D. 372. 1 Taunton 378 3 T.R. 57.

But in an action for selling one an article for another there must be an express warranty or fraud. A sound price does not imply a warranty of soundness. 2 Caines 40 Scipio vs Wood.

How assent may be invalidated.

Ignorance or mistake will in some cases invalidate an assent. But in general ignorance of the Law will not. This ignorance or error must regularly be upon matters of fact.

If one person is under a mistake or error of his own voluntarily by the fraud of the other, it invalidates the assent, for no man shall take advantage of his own wrong. But where, on a doubtful point of right in matter of law, there is a compromise, both being ignorant on which side the right lies, the contract binds them. It is a contract of hazard.

But if the party is really ignorant of the extent of his rights, I say Powell, he is not bound.

But this rule is not strictly true. His meaning is that the ignorance is in matter of fact.

In the case of Lans down & Lans down, where both were deceived by

1 Pow. 140.
10 M. 239.
4 Ves. ab. 532.
1 Ves. 19. 20.
1 P. W. 726.
2 Atk. 507.
1 Pow. 142.
3 P. W. 315
1 Pow. 144.
2 ib. 197. n.
1 Vez 400.

interest among merchants.
It was to cast the interest on
the original sum for the whole
time, then on the indorsments
and subtract it. It is also
erroneous to subtract the
indorsments from the princi-
pal, without paying the inter-
est previous thereto. Both of
these modes are unfavora-
ble to the creditor.

Another mode is, when an
indorsment is made, not suf-
ficient to discharge the inter-
est, the interest which the cre-
ditor claims due must not
have interest upon it. It will
be compound interest.

If one take a note from
another & forbear it to run a
number of years & then makes
a demand, & the borrower, to
induce the holder to forbear
gives a new note, incorpo-
rating in it the compound
interest. It is usurious.

But if the interest is received
not for forbearance, but upon
the voluntary agreement
of the borrower, it is not usu-
rious.

Manner of proceeding &
-void an usurious contra

If the usury appear on the
of the contract it may be a
voided by a demurrer.

If not the plea & avoid
must be the general plea
non est factum - but the
usury must be pleaded spe
-ally in bar & the sum reser
Show 329. order legal interest stated.
1 Raw 466.
2 Ann 294. In actions on Specialt
3 Mod. 35. deeds the word corrupt
-ment must be used.

In an action for the pena
the receipt of the usury m
be stated in the declaratio
Talb 114. 30.
2 Ves 170. Chancery will order usurio
money to be restored if it ha
1 Ed R.L. 50. been paid. Vid ante page.

Paying usurious money will
make the payer particeps crim
for he may be constrained by
pression to pay it - the time
cial & this one which prevai
in many other cases, is that
person to whom usurious inte
is paid cannot in good cons
retain it -

Statutes of usury are founded merely on policy so far as the penalty is inflicted - for there can be no justice as between the parties in annulling the whole contract.

A new trial is never granted to a plaintiff who has failed in a recovery on a penal statute - Such an action is in the nature of a criminal prosecution - And no man shall be twice put in jeopardy for the same offence.

At the time of taking usury no action will lie - but an alteration of the penalty per 3 Mills 250. 7 Dunn 547. 11. Co. 53. Cro. J. 595.

If one makes a contract not to exercise a particular trade in a particular place without consideration, the contract is void. If the contract is violated the damages must be proportioned to the injury sustained - Chancery will relieve against penalties but now the Legislature requires to estimate damages - and they are to be guarded against -

Stra. 789. 10 Wm. 101. 19 Moor 175. 2 Ld Raym 1347.

If it does not appear
a penalty but is natura
a penalty merely, or if clau
agreed by the parties - Com
Bro Ch: 419. Cannot relieve -

A contract is sometim
good altho' the security
as if A. B & C are together
are gaming, B borrows mo
of A & gives his bond - here th
Bum: 1077. bond is void, but the pa
Dum 732. contract is good.

A contract for an annu
is void i.e. the security of t
money must be paid.

There has been a decision
N.Y. that if a good note
that is usurious we migh
is one, that upon the last
founded note being made
the good note is not destroy
by it -

Contracts obtained by force
set aside both at Law & equity

Those obtained by fraud
set aside sometimes at Law
sometimes in Equity - When
force amounts to what is ca
duress, it will be set aside at
If not Chancery only can int
J.R. thinks the destruction

Duress,

Is of two kinds.

I Duress by imprisonment.

II. Duress per Minas.

Wherever a man is illegally imprisoned and to obtain his discharge enters into a covenant, it is void - whether the debt for which he is imprisoned is just or unjust.

If a man be illegally imprisoned and gives a bond to obtain his liberty it is void unless there is an Attorney on his behalf present.

The terms void & voidable are often used promiscuously.

It is an essential ingredient in duress that the imprisonment should be false or illegal, therefore altho a man has been imprisoned without sufficient cause yet if the imprisonment was under the authority of law it is legal - Yet damages will be awarded. 1 Lev. 69. 9 Vin 322 b. 317, 319

When a Sailor however has been bribed by the creditor & misuses the prisoner &c it is deemed, altho imprisonment is legal. 9 Vin 315

There is much dispute in the books whether property illegally taken by force is dumpage, it being very important for the Son who executes the bond.
9 Vin 316. The current of authorities against it.

When a friend intervenes to liberate a person however unlawfully imprisoned, he cannot take advantage of the dumpage unless he stands in the relation of parent child or husband.
1 Sid. 123.
9 Vin 314. 17.
Cro. J. 107.
2 Ray: 957.
9 Vin 317. 19.

Dumpage of imprisonment is when any one is illegally imprisoned and gives a bond for his discharge in this case the man and the bond cannot maintain the debt is.

Duress per minas,

is where one is put in fear by threats & gives a bond. Here he may avoid the bond & the same rule applies as to who may avoid it as in other species of duress. 9 Ves. 319.

Every contract obtained by duress may be avoided, this not by pleading non est factum it must be specially pleaded, showing the nature of the duress. 5 Co. 17 a 19.

Chancery will set aside all contracts obtained by duress & will go much further than courts of law & set aside contracts obtained improperly by acts not amounting to duress. Also when there is undue influence. 2 Ves. 497. 3 P. Wms. 294 n.

That contracts may be unmade after duress & be good, see 1 P. Wms. 727. & Reg. 152.

Where a person is under a report for an offer or defence for the opinion of another it is not duress. 1 Veg. 19. 1 Ath. 11.

Courts of Chancery will set aside contracts where there is no terror or improper restraint. 1 P. Wms. 118.

Fraudulent Contracts.

Contracts infected with fraud are some of them set aside at Law, others in equity. Others are void in neither of the courts but the party injured may have remedy by an action for damages.

Contracts void at law are those where a man makes one contract when he supposes he is making another. This is fraud or mistake in the execution.

Contracts void in Chancery or rescinded in equity are where there is fraud in the consideration.

Whenever there is fraud the party injured has his remedy in some manner.

Where there is a sale of personal property & there is fraud, the party injured has remedy by an action for damages. Or in this case the property vests in the vendee & confirms the contract. This is the general method when personal property is concerned

When the consideration has been paid on a fraudulent contract, the money may be recovered back as for money had and received -

Contracts not fraudulent in the literal sense of the word are frequently relieved against in Chancery. As where there is an undue advantage taken of a persons situation.

A false warranty is demonstrated fraud, altho' the maker was ignorant of it. 1 Rol. 96. 1 Bac. 146.

This warranty does not extend to things that are visible.

In order to recover on a warranty, it must be made at the time of sale - Co. L. 630

The principle upon which the Sword. case was decided L.R. think correct - but he supposes he might have his remedy by another way besides the warranty for the false affirmation - There is an implied warranty that the vendor is the owner of the property sold - Cowth. 90. 1 Salk. 210.

On a sale in good faith & without warranty the buyer takes the risk 2 Johns. 179 Note.

False affirmations.

The law on this subject is very obscure and difficult to be understood. I R. thinks that it is correct, that if a person will make any false affirmation for the purpose of enhancing the value he is liable, whether he is knowing to the truth of his affirmation or not. And he is liable whether he has any interest or not.

3 Dom: 51. 1 East. 315.

If a man so conduct as to lead another into a deception tho' not by affirmation, yet is liable for the deception.

If there is a concealment of a defect it is fraud, if it be just that the bargain would not have been made if discovered.

If one purchasing article in the country represents the market price falsely. R. thinks he is liable.

Co. L. 474. Salk 211. Rol. 91. Mod. 261. 1 Show 60. 10 Mod. 142. 1 Ban 50.

Under the mercantile law there must be no suspicion of the truth. but there must be a perfect integrity or the instrument stands will be void.

Inequality in the contract has been considered a ground for Chancery to interfere to relieve against it - but fraud must be mingled with it - 1 Salk. 41. 2 Salk 449
but there cases the presumption that there was fraud.
Taking unreasonable advantage of the situation of another will vitiate the contract in Chancery. 3 P.W. 290. 1 Vern 465. 1 Bro. Ch. 176. 3 Bro. Ch. 183
Another case under this head is one actually fraudulent, by misrepresentation 1 Mills 229
Intoxication produced by the person taking advantage of it will be relieved against - 2 Dow. 763. 1 Ves 475.
Fraud upon this Persons will be relieved against - 10 P.W. 496
No subsequent agreement to pay a debt of this kind will purge the fraud - 3 P.W. 75.
There are a number of cases of a different kind under this head which are denominated bargains with heirs for their expectancies 3 P.W. 292. 1 P.W. 32
these are relieved against in Ch. from policy, & encouraging luxury & extravagance -
The case of the Ex. of Vernon was a exception but he was in opposition reported in Atk. 2 Vez. 159.

Contracts necessary to be in writing -

This subject is regulated by Statute of Frauds and Perjuries. This Statute had received its construction before it was adopted in this country - the decisions thereupon on this subject have been adopted.

Whether at Common Law any contract must be in writing to make it valid may be a question - It is said that time is not known when indentures could be by parol.

The Statute requires that all contracts of an Executor to pay with his own money must be in writing - 2d A promise to pay the debt, default or miscarriage of another 3d - All contracts in consideration of marriage. 4th All contracts for the sale of Lands. 5th All contracts not to be performed within one year.

Declarations & assignments of trusts must be in writing -

Contracts for sale of goods &c for upwards of $10 must be in writing or a part

There have been perhaps more decisions on this Statute than any other except the Statute of wills.

There are two branches of this Statute which need little explanation. Contracts of Executors & admrs, in consideration of marriage & those to be performed within one year.

But contracts for land and to pay the debt of another are more complicated.

There are many cases of promises to pay the debt of another not within the Statute by accommodations are not directly promises and not within the Statute. But a promise to pay if the other does not is within the Statute & must be in writing.

It is said in the books that an original promise is not within the Statute, but a collateral one is. The only difficulty is to know the distinction. When the person promising is the debtor & the other discharged it is original.

But if the person for whom the promise is made is liable in ordinary cases it is a collateral promise & within the Statute.

But there are cases when the original debtor is not entitled discharged, but the security against him is lost this case is not within the Statute.

A promise to pay the debt of another if the creditor will abstain from suing is within the Statute.

Contracts respecting real property.

Where there has been a parol promise to convey & part performance on one side the Court of Chancery will compel a specific performance of the contract.

Here the Law will not suffer a man to make use of this statute to commit fraud upon another no more than a breach of promise is a fraud

If a contract can be proved without bringing into view the terms of it, this is not within the Statute - Because the Statute was made to prevent the disagreement of witnesses about the terms in matters of great importance - If the facts are such that there is no danger of fraud or perjury, it is not within the Statute -

Lands sold at Auction, when struck off pass to the bidder tho' the contract is by parol yet it is not within the Statute

Ray 224
Cow. 227

A promise to pay a Physician for the cure of another is within the Statute - This can I. R. strictly explanatory of former ones - 2 T.R. 80. 81 -

1 Salk 27.

It is said that if there is any liability in the original debtor, the promise must be in writing - The case in Mun: is an important one & contains much law

5 Mod. 20
9 Burr. 1808
1 Wills 304
2 Ray 1084
Stra 87

II. Contracts of Executors and Administrators.

The Statute provides that every contract made by an Executor or administrator to answer damages out of his own estate must be in writing. As to this case there only this distinction to be made. That where there is property enough belonging to the deceased in the hands of the Executor he may bind upon his promise not at the election of a party.

Dow. 204.

III. Marriage Contracts.

The Statute enacts that all parol contracts in consideration of marriage shall be void. This does not extend to promises or marriage settlements but extends to the agreements respecting money to be paid in consideration of marriage.

Pla. 34

Contracts respecting real property -

It is not every memorandum in writing that will dispose of property. It is however generally necessary that there should be a memorandum in writing in every contract for the sale of real property to make it valid.

But there are exceptions as has been mentioned & vendors of real property - some of the cases cited in the margin apply to marriage contracts.

1 Ves. 290. 2 Ab. 373 Pre Ch: 509. 5 Vin 523. Pow 296. Pre Ch: 304

There are cases when the delivery of possession is considered as part performance or part of the consideration paid - and on the other hand there are cases when it will not be thus considered this will depend upon the circumstances of the case. See 2 Ves 306. 1 Vez. 297.

It has been a litigated point whether a payment of money was a part execution

of the contract so as to take it out of the Statute. There is no direct decision in England, tho' there is a case in 3 Atk. 4. which can be reconciled on no other ground.

Pow 307.

It has been much litigated in Connecticut. The last decision of the court of errors, confirms the principle in Atk. All these cases go upon the ground that there shall be a written contract in future. Therefore if there is nothing more than a parol contract that one shall have the use or improvement of land for ten years or any time it is void in every respect.

Vid 2. Ca. Ca. in Engr. Dr. in Pay. of consideration money, possession & improvements taken out of Statute & Principle for which no decree.

Pre Ch. 402. 1 P.W. 770.

If the court finds that there was a contract without depending on the testimony of any witnesses, the contract will be enforced in Chancery

Pre Ch. 374. 2 Ch. Ca. 3 Atk. 309. Pre Ch. 526.

There are one or two cases when I. R. thinks the decisions have gone too far. Thus where one of the parties has been

to recite the terms of the agreement it has been decided that this takes it out of the Statute. Does? Is not this defeating what the Statute intended to remedy? The person who heard the confession is as likely to forget, as the one who heard the agreement it self. 1 Veg 222 3 Atk 407.

Contracts not to be performed within a year by the Statute are void unless in writing. But if it depends on a contingency which may or may not happen within a year, the contract is good altho the contingency does not happen within that time. But when by the precise terms of the contract, it is not to be performed within a year, it is void unless in writing.

Under the clause, no one shall be answerable for the debt of another there is a case in Will. already mentioned, which has been suffered to deviate from the gen-

general rule - but that wo
not to pay the debt of anoth
but in consideration he
would withdraw - And
it in England being a co
plete bar & a unfortun cl

As to real property.

Fals 61 - Parts may take a case
out of the Statute -

The memorandum or wr
ting must be signed - Signin
in common parlance
subscribing the name at
the bottom of an instrum
But it seems settled that it
not material where the
ing is - If it is with intent
validate the instrument
it sufficient & testimony
be admitted to shew
what intent the signing
was made.

O.M. 770.

Letters written containing
propositions acted upon by
opposite party are binding.

1 Ves. 201
2 Ves. 222

The terms must not be
doubtful or it will not bind

Pe Ch: 506.
Tria 426.

Parol testimony may also
be admitted to any instrument
relief in equity -

2 Cy. 299

Construction of words in Statutes.

Words are to be understood according to the vulgar and common acceptation, and that in the place where they are used. If one man agrees to deliver another twenty barrels of cider - here in common acceptation he is not to have the barrels but the cider only. Plow 086.

In England the term month is understood a lunar month, legally a calendar one. 2 Bl.C. 141. 6 Co. 61

In England a twelve month is good for a year and it would be here. But twelve months in England do not include a year in common acceptation - Here they do.

Consideration of Contract.

In every executory contract a consideration is necessary or the contract is not binding. This is settled law.

But an executed contract imports consideration & is binding tho' there is no consideration.

It is laid down in all the books that a contract to dispose of real property without consideration, is void, to the use of the grantor.

This is the case when the contract is executed.

The history of this business & a subsequent statute in England will explain it, and shew that such a conveyance is good here.

During the wars between the houses of York & Lancaster the opposers of the prevailing party were considered as traitors and their property was confiscated. Hence lands were granted which it could not

...ication. These estates were ...ed without any considera... ...n & the legal title vested ...a man who perhaps had ...advantage from the con... ...ance. Hence it became ...practice to consider just ...estates conveyed without ...consideration, as inuring ...the benefit of the grantor ...& the title was passed to ...the trustee. After this the ...statute of Uses was made ...which says that a trust ...estate should inure to the ...benefit of or vest in the ...grantor.

It is said that if a ...tory contract is writ... ...it is good without a ...sideration. This is not ...e. The truth is no parol ...ce can be admitted to con...dict the writing. If there ...e written documents to ...ow there was no considera... ...n, the contract is bad. ...ut to it it is if appear on the ...e of the contract that was no ...sideration.

A Scaled instrument is good in England tho' there is no consideration expressed in the instrument. But this goes on the ground that the sealing itself is a consideration. Tho' you may shew what the consideration is, tho you cannot prove there was none the act of sealing proving there was some consideration, the damages will be nominal.

L.R. think even in Scaled instruments if the want of consideration appears on the face of the instrument, no recovery can be had.

An Executory contract not good without consideration. Vid: 1 Pow 330. 1 Salk 129. 2 Ray. 909. 5 Dun 145.

It makes no difference as to the consideration whether the contract is in writing or not.

3 Dun: 1667. 1 Pow 337.

Kid on bills 155. 4 Mod: 242. 1 Stra: 674.

About this last rule there has been considerable contest.

A recovery will be had on a valid instrument in every case, tho' the damages will be merely nominal, and you may prove the quantum of consideration. Doug 341.

Contracts executed are good tho' without consideration. 1 Burr 237. Esp. 577. Str. 953

The quantum of the consideration is not material to the validity of the contract. But there must be something either advantageous to one of the parties or disadvantageous to the other.

Therefore if there is a disadvantage to the promisee or advantage to the promisor, it is generally a sufficient consideration. 1 Wm 217 1 Doug 152 Ibid 743. 7 Mill 236 Esp. q 4. Cro E. 206

Consideration for things past.

The general rule on the subject is that a consideration for things past is not binding. Where the promisor receives no advantage for the act done, the promise is in no case binding.

And even when he has an advantage the old authorities say he is not bound. But there are opinions of judges which militate against this rule. The S.C. have decided directly in point.

1 Pow 340 2 Plow. 5. 302. Ep. 97. 95.

Where there is a previous legal obligation which is the foundation of the contract for the act done, the promise is good.

Judge R. states a case reported to him by Pettigrew upon paying the hire for the burial of his son. This subject is 1 Pow 350 - Cro C. 730. 10 Co. 76 S. Raymond 260

Even if there was a moral obligation, the promise is good as a promise to pay a debt barred by the Statute of limitations

1 Bow. 351.
7 Ray. 129.
Cow. 290.
Esp. 95.
D. N.P. 147.

A promise to pay a debt before barred by the Statute and it then runs over, tho' the promise is within the time yet generally does not take the case out of the Statute - tho' it may in certain cases.

1 Vent 260.
Cro E. 409.
Cro J. 10.

A promise to a mere stranger to pay him for the act of another, will not entitle the stranger to a recovery however meritorious the act may be - Yet if it is a relation it may be good - As where a John promised the father that he would pay the daughter -

Hd 1 John: 139
Hd: 1 Cairy 46
Contra -

1 Bow. 349.
359.
Ventris.

And the relation of guardian & Ward has been held sufficient

When a promise was made to the guardian for the benefit of the ward, an action was denied to lie in the ward name -

8 Mod 117.
Cow. 444.
1 Vent. 6. 318
392.

A decision in the nation Court has recognized the prin State. This happened in Ken

Where there is no legal moral obligation a prom is not good for want of co eration. As where a man threatens a woman that would sue her for the deb her for, and she thereupo promised to pay. The prom was held not binding.

1 Pow 354.

There is one case wher It is said there seems to have a prior moral obligation yet the party held not liable.

This was a case where married woman contract and when she became a wi promised to pay. The prom was held not binding.

Ep. 95.

It is contended that if the son was not liable before the win, the promise does not m him liable.

It has been said that a bond executed, who delivered, makes the contract executed.

As to forbearance see Cow 29 2 Dunn. 765. 759.

Promises

There are cases when the condition of the promise depends upon something to be done previously.

Another Set of cases is when it is uncertain what is to be performed first.

The last class of cases is where the promise and the act are mutual, and done at the same time. In the first case he who is to perform the condition precedent, must perform it before he can sue the other for a non performance on his part. And he must allege performance in his declaration. This is also the rule in the second class of cases. But where the condition precedent is to be performed on a particular day, or by such a time, if it is not done at an action may be brot by the person who was to perform the condition, for the consideration. And the Defendant in this case has his damages, what may be more than the consideration. This is the reason that the Plff in the case above recovers.

1. Will 96.
1 W. Bl: 274.
7 Co: 10.
7 D & E. 130
4 D & E. 761.
8 D & E. 366.
3 Salk 112. 171.
1 W. Bl: 368.
1 Vent. 147.
1 Saund. 319.
1 Bowel 950.
Hob. 88.
1 Mod. 411.
1 Br: Par 484.

When there is a consideration expressed none is to be implied but that expressed is considered to be the true one.

1 Pow. 358.
1 Vez. 45.
7 Co. 40.

Where a bargain is made to be executed hereafter & a right of recovery is attached by agreement to abolish it, good. But after the right has attached, a parol discharge will not discharge a parol contract, for the parties are entitled to a recovery for damages when it is not performed.

1 Pow. 413.
Cro E. 704.
3 Mod. 84.

But a written discharge is good in all cases.

The law will in certain cases presume a waiver of the claim.

1 Bl. Par: 116.
1 Pow. Con. 9.
par 413 to 421.

A contract of an inferior nature may be always annexed to a higher security.

1 Pow. 270.
5 Co 45.
Cro J. 479.

In certain cases from the very nature of it there may be a waiver of the contract. If one buy a horse with condition that he be good & the warrant or that he likes the horse. The purchaser may waive the contract tho' the other party cannot.

And a contract may be void when the performance of it is void & illegal. Tho' a Court of Chancery will compel performance of what is legal

5. Bl. Par 259.
1 Pow. 444.
3 Mod. 51.

When an Contract is entered into to deliver articles, and then is a non performance of the delivery, when the money has been paid. the party who has paid the money may resort to indebitatus assumpsit, instead of an action for damages, and recover.

Cp. 13. 7 D.& E. 101.

Conclusion of a bargain.

Before a bargain is closed there must be a previous conversation about the bargain.

1 Pow. 83. Pow. 41. 1 W. Bl. 383. 2 ib: 716. 1 Atk. 248 7 T.R. 64.

If a man has a higher remedy the promise is good for nothing. This is not on the ground of want of consideration but because there is a higher security.

But if the bond be lost, would not the promise be good? L.R. thinks it ought tho' the common practice is to declare that the bond is lost by time and accident.

But when there is a bond & a man says shew me the bond and I will pay it. the bond is the rule of damages.

Co 9. 89. Co Car. 343. Co Eliz. 740 Moor 740.

The universal rule of damages upon non payment of money, is the principle & interest.

It is also a universal rule that where the promise is upon any collateral thing, the value of the thing at the time of the contract is to be estimated - and the interest from that time.

When a man has promised another to do a particular act & fails of performance there is some difficulty in ascertaining what damages are to be recovered. All direct damages, i.e. all damages which can be rendered certain are recoverable - Remote damages or those that cannot be rendered certain cannot be inquired into - Where the latter it is not known that there was a damage -

1 John: 139. his ante

A parol promise from one person to another for the benefit of a third person, will enable that third person to maintain an action on such promise -

Actions arising upon the breach or non performance of contracts -

Judge Reeve, before he enters on any one action particularly will premise how far the action of assumpsit is concurrent with others -

Where there is an express promise to pay, either special or indebitatus assumpsit or debt may be brot - and it is immaterial in this case whether the promise be in writing or by parol -

If special assumpsit is brot you must state the promise as it was, but it is not necessary in the declaration to shew whether the contract was in writing or by parol - Even if it be necessary that the contract should be in writing, it need not be stated in the declaration - but if parol evidence be adduced to prove the contract, here is the proper place to take advantage of the contract's being unwritten - 1 Cairns 46.

When there is no consideration, you may demur - and not plead non assumpsit -

Formerly Indebitatus assumpsit was always concurrent with the action of debt. But assumpsit is now extended to lies where no other action

In what cases is the action of Indebitatus assumpsit the only action?

There are cases when there is no implication of payment - or when the case rebuts every idea of contract -

For example if your horse has been stolen and sold, you have your election of your remedies -

1 You may treat the person who took the horse either as a trespasser or a thief -

Or you may bring trover for the horse in the hands of the purchaser - Or if the person who sold him has made a good bargain, and is a man of property, you may treat him as your agent in selling the horse - bring Indebitatus assumpsit & recover the money

for which the horse was sold.
Then there is no implication
of payment on the part of the
Defendant.

In case of an assault & battery
when money has been taken
Assumpsit will lie to recover
the money - and an action on
the case to recover damages
Here the case rebuts all idea
of a contract -

Debt will lie when there
is a sum certain, altho' no
express agreement to pay.

Where you have a higher
remedy you cannot sue upon
an inferior security - as if
there is a writing you can-
not bring an action upon
a parol promise or agree-
ment -

Assumpsit will lie for mo-
ney where it is due ex æquo
& bono -

Where goods were pawned &
money extorted from the per-
son pawning them upon rede-
livery -

Assumpsit will lie for
labor goods &c.

2 Burr. 1005.

Stra:

Stra 915.

Cow. 419.

1 Lev. 70.

Assumpsit will lie on an award where there is no writing as well as where there is Debt or Assumpsit will lie

Rol. 11. 2 Lev. 252. to recover a penalty on a Statute.

2 Mod. 260. 1 Show 35. B.N.P. 130. 5 Bun. 2699. Where one receives money without authority, assumpsit will lie.

2 Bl. R. 1070. Where there is a dispute respecting a title which is concealed, assumpsit will lie.

Cow. 38. Bun 2005. Wages may be recovered by this action.

As to voluntary contracts see Rob. Pob.

When a person is done with a manifest view of reward and a promise is made to pay it. It is uncertain whether an action will lie. If the sum is uncertain the action will not lie.

Cow 566. There is one case where a voluntary courtesy will bind this is upon mercantile negotiations.

1 Caines 104. Assumpsit will not lie by a branch pilot of N.Y. on a contract made with a vessel in distress.

Quere Vide and when?

If a person binds himself under hand and seal to do a certain act for a certain consideration and he fail assumpsit will lie to recover back the consideration paid - 1 Cairns 47.

In assumpsit on mutual promises they must be laid in the declaration as concurrent - If stated to be "afterwards to wit on the same day", it is bad & the promise is a nudum pactum - 1 Cairns 50.

In an action of account, the defendant may always come into court and demand his own oath to disclose - But if it is said if he has promised that he will account, he may be sued in assumpsit - And then cannot disclose - But this action lies only for the breach of promise - Salk 9.

Assumpsit cannot be maintained by one partner against another for a balance due on a joint transaction, unless evidence be given of an express promise - 2 Cairns 29.

Where there is a contract made to build a house for a specified sum and the house is not finished, but partly finished, the builder will recover in equity in proportion to the sum agreed upon, according to the work done.

3 Atk. 136.

Sometimes a promise contains duties which are to be performed.

Co Car 175.

Where there is a previous act to be done it must be averred in the declaration.

2 Burr. 999.

Where there is a duty to be performed and a man by the means of knowledge, and it is just a contract as a tender will fulfil - there is no need of a demand. Otherwise there must be a demand before action brot.

Hob. 51. 60. 1 Stra. 88. 2 Bl. 1073. 573. 1 Mill 38.

Mercantile notices upon bills and orders go upon the same principle - Notice must be given that the bill or order is not paid.

Due bills upon stores for goods must be presented before suit. Where there can be no tender.

When the knowledge is in one party and the other has only the means of knowledge, no time is not necessary. Cro J. 493.

Wherever your debt arises from public offices, a demand is necessary.

Where there is a mutual promise made and both are to perform. See Hob. 88. 1 Mill 88.

Where the act previously to be done has no question of law involved, but merely a fact it is sufficient to state in the declaration that the thing was done. But when a question of law is involved you must state how the thing was done. Cro E. 292. Cro J. 503.

In the action of assumpsit you must show how the debt arose, as for goods sold & services rendered or work done, for money had & received &c &c. Cro J. 206 Carth 270

There is a limit unless as to money lent. 2 Mill 141. 1 Salk. 23. 3 Mill. 30d.

In all declarations upon a special breach, it must be stated precisely as it was. 1 Vent.

Where money is to be paid on a particular day, the tender must be made at the time and place. But if on or before, it may be paid before and allege that it was on the day.

1 Sal. 620
B. Ray. 730.
Stra. 74.
B.N.P. 145.

It is not only necessary to state the case precisely as it was, but you must state the consideration as it was.

Co. L. 79.
Co. 8. 149.

The law seems to have been altered from what it was, for merly the old authorities held that if a special declaration was not proven, you could not resort to an indeb. assumpsit. But the rule is now altered.

Doug. 651.
B.N.P. 139.
1 Stra. 648.

Assumpsit generally.

Assumpsit includes all cases where there is an express agreement to pay money, whether the agreement is written or parol. So of bills also in this case.

It lies in all cases where goods have been delivered, where services have been rendered, where money has been loaned and where it has been illegally obtained, provided both parties are not concerned in the illegality.

When a contract has been so framed as to be disannulled. If the money has been paid, assumpsit will lie to recover it back.

Assumpsit will never lie on sealed instruments, nor on a count to which there is an express promise. But the consideration money for a sealed instrument, may be recovered back in this action, if the contract is broken. 1 Cairns 47

It will lie for money found in the street.

Action of Debt.

Debt will lie upon all express contracts as well as implied but is now out of use.

Debt is the only action on single bills and bonds.

When there is a penalty the action is brot on it without disclosing the condition.

Upon breach of condition formerly the whole penalty was forfeited. But Courts of Chancery interfered and relieved. At length a Statute was made giving courts of law power to cancel the bond & the sum actually due.

By Stat. N.Y. in case of bonds, bills & contracts with a penalty for non-payment of a sum only, the sum *bona fide* & in equity due & not the penalty shall be deemed & be the debt due. R.L. 347.

The action of Debt is sued when there is a lease of land reserving annual rent.

Action of Debt may be brot on bail bonds.

When the security is given up during the life of the execution the bail bond is discharged. But if there is a return of the execution with non est inventus - at that moment the bond is valid and cannot be discharged by any subsequent delivery unless there is collusion in the return -

The action of Debt lies on a judgment - In England a execution - cannot issue unless within one year after judgment. 1 Bob 206

Where a justice dies or removes, Debt will lie - In these cases you cannot go to the consideration of the judgment unless it is a foreign judgment - But if the judgment is obtained by any mean trick, it will be set aside -

It has been decided in N.Y. that a judgment in a justice State is only prima facie evidence of a debt, and the consideration thereof is examinable in our courts. 1 Cairns 466

debt upon judgment may be brot against the heir as well as the executor.

1 R.L. 245. By Stat. N.Y. Creditors may sue heirs & devisees on simple contract and specialty debts and they are made answerable for false pleas. And heir alliening land before suit brot must answer for the value. In this case creditors may proceed as in actions against Executors & adrs. The execution goes against the heir to the value of the land, or if the same were the proper debt of the heir. But lands bona fide sold before action brot are not liable to such execution.

The heir may plead nothing by descent. And if the jury find for the Plaintiff they shall inquire of the lands descended.

If judgment goes by default or confession, it is for the debt & damages, without any writ to inquire of the lands so descended.

it is immaterial whether the Exs. executors or administrators are mentioned in a covenant or deed. They are equally bound tho' they were named.

Rent is one species of contract singular in its nature for which a action of debt will lie. It is where a lease is made for a number of years reserving annual rent. If this lease is assigned by the lessee the lessor may sue the assignee for the rent, or he may prosecute the lessee. but having made his election to take the assignee he cannot resort to the lessee. Debt then can not be brot against either.

9 Co. 22. Cro J. 334. 3 Lev. 122. 1 Salk.

There can be no apportionment of the interest in this case.

Cro E. 633.

Debt lies against the Sheriff for an escape on execution on the debt & damages for which the prisoner was arrested. This is by Statute. But the common law remedy by action on the case is not taken away. In debt the Plff can recover only the precise amount of the original

1 R. 2. 212.

2 Vern. 454 Fin. ante

judgment. If case is brot, interest may be allowed.

But for a escape on mesne process debt will not lie - for here damages are discretionary and uncertain. Case is the proper action.

Debt will lie against the Sheriff when he has levied execution, but has not paid it over.

In an action of debt upon simple contract you must state the thing sold, or consideration of the promise to pay. The declaration differs not materially from a pleadings in form.

When a sealed instrument bond no consideration need be stated, for the instrument implies one.

Willis v. Stovall 1 Ov.

On a penal bond, the plaintiff may declare generally on the bond without mentioning the penalty.

In actions on bonds joint & for non-payment of covenants, &c. the plaintiff may assign

R. 2. 349.

any breaches as he may think fit & the jury shall assess the damages thereon and on judgment by default confession or demurrer, he may suggest breaches on the roll & have damages assessed by a jury -

As to the proceedings under this Statute See 1 Saund. 58 note 1. by Wms - 2 ib. 107 -

There is an old action now out of use called Detinue which is to recover the specific thing - But this is impracticable when the Defendant is obstinate - Where it was found necessary to resort to the alternative that there should be a redelivery or a penalty in damages.

B. N.P. 49 to 51.

Action of Covenant.

A covenant is nothing more than a sealed promise. It is the same case as when a simple bill is brot on a promise not sealed.

Cro. Eliz. 136.
Cro. E. 212.
1 Co. 110.
1 Rol. 519.
Co. T. 379

There may be an implied covenant. tho' there is some distinction between that and an implied promise.

There is an implied covenant which does not imply any agreement. As when it is necessary for the enjoyment of the thing to convey which there is an express covenant.

4 Co. 80.
Carth. 90.
Cro. E. 214.

When there is a covenant to a thing in a certain instrument, they are not to extend the covenant beyond, the the covenant itself may extend further.

2 Vent. 140.

A man is not bound to perform a covenant impossible to be performed.

Salk. 114.

Where the words of a covenant are doubtful, they are to be taken most strongly against the covenantor.

1 Lev. 109.

In an conveyance are two covenants. Warranty and seizin - on the first an action may be brot as soon as the title is found defective but on the latter an action will not lie until the covenantee is ejected - It is the common practice in this Case & Court in the grantor for security - If this is not done the grantor may maintain his title on being sued by the grantee & defeat his recovery but he must be at the expense & trouble of a new trial -

Ros. 12. 35
Co C. 218
1 Stra. 505

The words "grant bargain sell alien and confirm" in a conveyance in fee, do not imply a covenant - It is implied by the word "dedi" or "give" -

2 Cains 18

When a person binds himself in a penalty for breach of covenant - an action of debt will lie on the penalty or an action may be brought on the covenant - But when there has been a action on the covenant it cannot be on the

4 Burn. 243

When there is a condition that a man shall not plow a certain piece of land, or not do any other specified act under a penalty ^ forfeiting a certain sum, there is much dispute whether this is a penalty or a specified damages between the parties. This is generally decided according to the amount of the forfeiture. If it is a large sum it will be deemed a penalty, otherwise specified damages.

Assigns.

If the covenant respect a thing in being at the time the covenant is made, and inures the premises, the assignees are bound whether named or not. but if the thing do not exist at the time of making the covenant, the assignees must be named & then bound liable. And tho' named they are not bound when the covenant does not relate to the premises, and is of no advantage to the assigns. 5 Co: 16.

The case in Coke cited contains all the law on this subject.

The assignee is only bound on the footing of priority of estate or advantage to him. 3 Salk 109. 10 Ed. R. 351.

The assignment must be for the whole term. Wolfield's 14 Eliz. Dorg.

If the lessor accepts the rent of the assignee, he can not resort to the lessor for any subsequent rent. Cro. J. 309 Ld Car. 413 3 Co. Wal. case.

On the death of the Covenantee the Executor always brings the action when the covenant respects personal property - Where it concerns real Property sometimes the heir and sometimes the Executors prosecute -

If the covenant was broken in the life time of the Covenantee, so that a right of action had accrued, the Executor sues, otherwise the heir may -

2 Lev. 25. 92.

Bailment.

By Gould.

Bailment is a delivery of goods on a contract express or implied with a condition that they shall be redelivered when required by him. 2 Dl: C. 451. Jones, 3. 48.

On this subject there is great contrariety of opinions in the books. Every bailee has a qualified interest in the goods bailed. It is now settled that law will protect possession gives a qualified property. The case in Coke Lit. 89 thinks not law. 27 P. 392. Stra: 505. 3 Salk: 46. 4 Co: 83 b. Contra:

From the rule that the bailee must return the goods, it would follow that he is liable for any fault or damage. But the general rule is that he is not liable for any loss or damage happening without his fault. The nature of the bailment and the quality of the goods are to be considered & determine whether the bailee is in fault. 1 Bac: 286.

To determine what degree of care should be taken by the bailee constitutes the most material distinction in this title.

The general rule is that the diligence must be proportioned to the nature of the bailment and goods bailed.

There are different degrees of diligence required in different kinds of bailment.

1. More than ordinary diligence
2. Ordinary diligence
3. Less than ordinary diligence

Ordinary diligence is that which men generally use over their own goods. This is the standard. In bailments requiring more, or some less than ordinary diligence according to the nature of the case.

The omission of ordinary care is called ordinary neglect. the omission of more than ordinary care is slight neglect, and of less than ordinary care great or gross neglect.

Gross neglect is prima facie evidence of fraud in the bailee 2 Kay. 915. but this may be rebutted.

If the bailment is only for the benefit of the bailor, only slight Ibid. faith is required in the bailee.

to charge the common carrier the goods must have been lost or destroyed while in his possession & under his sole care. Ep. 621. N.P.C. 70. 2 Show 327. 1 Stra. 649: 1 Roll. 17. Cro Ja: 630. 1 Roll. 2.

If the loss is occasioned by an act advised by the bailor the bailee is not liable.

It seems to be settled that a common carrier is liable for a loss of goods tho' ignorant of the value, as money or any other goods inclosed in a chest or trunk, unless by special acceptance that he will not. B.N.P. 70. 2 East. 128. Jones 148. Stra. 148. 2 Ca. Abr. 488.

And in two cases it has been decided that he is liable tho' misinformed respecting the value or quantity of the goods. Allen. 93 1 Vent. 238.

Mr. G. questions the propriety of these decisions and they have been expressly disapproved by L^d Mansfield & King. 1 Com. 213. 3 Keb. 135. 4 Burn. 2300 1 Stra. 145 1 East. 610 Jones 146

An advertisement in the public papers of the terms of the carrier when goods are delivered, will be sufficient evidence of a special acceptance without any personal agreement. Tho' the advertisement is good evidence to a jury- B.N.P. 71. 4 Burn. 2298. Ep. Dig. 622 Ca. Ab. 485. D.T.R. 591.

Under a general acceptance
carrier is liable except in cas
of fraud above mentioned, for
-ver goods he receives. that is
Carth. 485. to such as he receives a re
Ld. Raym. 82.
3 Mod. 70. for and no more.
Qu. Q. doubts whether his
1 M.M. 290. be to this extent when mis
forwd.
The owner of a stage co
rying passengers only for h
and not baggage, is not li
Com. Rep. 25. for the baggage if lost. But
2 Show. 128. the owner or master does
Salk. 282.
1 Bac. 343. baggage for a premium
is liable.
A pilot while on board
1 Johns. 305. vessel has the exclusive con
-duction of the vessel, and is
bound as master. Jus. hac vic
Quere whether the owners
Ibid. a ship are liable for the cond
of the pilot?
To render the carrier li
2 Bl. Rep. 916. it is not necessary that the
3 Mills. Mag. should be lost in transitu. If
1 Bac. 345. customary delivery & the
Owen 57. consignee he leaves them at
inn at the end of the cont
can not be is liable.

Whether is it necessary he should have been paid for his trouble, or that there should have been an express promise to pay for he may maintain an action against the bailee without such promise. (Bac. 243.

It is said if it is not the custom of the carrier to deliver the goods to the consignee, he is not liable, if he leaves them at the inn.

The person who selects the carrier is the proper person to sue for the loss of the goods whether it be consignee or consignor. 8 T.R. 330. 7 E.P. 35. 1 Bos. Can. 345. 350. Ep. 573

Tho' the consignee has chosen the carrier, yet if the consignor has made himself liable by agreement, or has an interest in the property, either may sue for the loss. 5 Burr 2680. 1 B.R. 659. 8 T.R. 333.

When joint owners of a ship are liable as common carriers they must all be joined in the action. Ep. D. 623. Salk. 440.

But when the carrier himself is sued the action may be a special one.

Advantage of the non joinder in this case must be taken by
5 Bun. 2611. a plea in abatement.
5 T.R. 651.

No action will lie against
1 Johns. 396. the executors or administrators of a post master for bank notes stolen by one of his Clerks out of a letter delivered at the Post Office. Could an action be maintained by the party against the post master himself if living? Quere -

In England it has been decided
2 Ray. 46. that the action will not lie.
Cow. 754.
Salk. 17.

The mode of declaring against common carriers is according & the custom of the realm, tho' this form is not necessary.
10 Bac. 343.
1 T.R. 33.
Mod. 10.
Johns 130.
1 Dis. 245.

A Special action on the case is the proper action against a common carrier for nonfeasance - For misfeasance in converting the goods to his own use, trover is the proper action.
Salk. 655.
Esp. 580.
Mod. 251.
5 Bun. 2827.
8 Co. 146.
5 Bac. 25.

Inn keepers are bailees of the fifth kind of bailment, who receive goods for hire.
Esp. 525.
3 T.R. 73.
Johns 133.

Any person who makes it his business to entertain strangers & furnish them with apartments and lodgings, is considered an Innkeeper when he has a inward. 3 Bac 179. Palm. 374.

The contract in this case is mutually advantageous and the general principle would render the innkeeper liable only for ordinary neglect, yet from reasons of policy, his liability is extended further, as for the torts of the servant. 8 Co. 32. 1 Bl. 430. B.N.P. 78.

According to the general rule the innkeeper is liable for goods stolen by a stranger; he is an insurer of goods lodged in his house. Cro. Ja: 189. 22 8 Co. 33.

There is an exception if the goods are stolen by the servant or companion of the guest or by a person who at his request lodges in the same apartment. Gl. 627. 8 Co 32. Cro El. 285. 3 Bac. 183.

It seems also that the Innkeeper is liable for a common robbery, tho' the rule is not clearly laid down. 8 Co. 32. 3 Bac 182. Yelv 135. 1 Com. 211. 5 T.R. 276.

Bailment of the Sixth Kind is called a Mandatum, a delivery of goods to carry, or some other act done by the bailee gratis.

Story 73. 50. 1 H. Bl. 159.

Here the contract being for the benefit of the bailor only the bailee is only liable for gross neglect, which proves the presumption of fraud.

1 H. B. 158. 1 Pow. 255.

This rule is applicable only to general acceptance the liability of the bailee may be extended by special acceptance.

There are certain cases where an engagement to use ordinary care may be implied by law. But this implication arises only in cases where the thing done comes within the professional business of the bailee. As where a taylor undertakes without a reward

1 H. Bl. 158. 151. 3 Bl. C. 165 Story 74. 87.

This implied agreement extends no further than as to the performance of the act itself not to any collateral incident.

2 Ld. 4. 120. 1 Pow. 255. 3 T. R. 73. 5 T. R. 143. Cro 9a. 667. Story 76. 10 Ves. 241. Dy. + Sh. 129. 1 Mod. 187. 3 Rep. 4i. 1. 45. 39 4.

but the bailee may be rendered liable by special agreement.
2 Raymond 910.

If the bailee receives benefit from the bailment more care is required - as in hiring lodging, partnership &c the bailee is answerable for ordinary diligence. Jones. 15. 33. 89.

When the bailment is mutually advantageous, the bailee is required to use ordinary diligence. Jones 14. 22: 101.

Bailments, according to writers on the common law are divided into six kinds. Some treat the divisions differently - Mr G. thinks neither are strictly correct but will pursue the common law method as the most convenient.

1 Depositum is a delivery of goods to be kept by the bailee without reward. This is sometimes called a naked bailment. 2 Raym. 909. B.N.P. 172. Ld. Dig. 618. Powell. Con. 247.

2. The second kind is called in Latin Commodatum. or hiring and borrowing - Here the strictest care is required in the bailee - Ibid.

There is one species of bailment which is no bailment - as where the goods are not to be specifically returned, but in value the same kind.

3. The third kind of bailment is called Locatio et conductio. In this case also the utmost diligence is required in the bailee.

4. The fourth kind is a delivery for security of a debt. This is called in Latin Pignus, in english Pledge.

5. A fifth kind is a delivery of goods to the bailee & he carries by him, or some act done by him for which he receives a reward.

6. Bailment of the fifth kind is the same as the fifth, only there is no reward received by the bailee.

1 Ray. 913.

2 Ray. 913.

2 Ray. 915.

Pow. C. 251.

2 Ray. 1.

1 Ray. 913.

Pow. C. considers some of these distinctions arbitrary - the 1st and 5th divisions may be ranked under one class. 2 may be considered as another division - the 3, 4th & 5th may be ranked under one class. As the same rules & principles apply to all

A fourth kind of bailment distinct from the others might include Common Carriers. and all cases falling within the principle.

In case of a Depositum the advantage being in favor of the bailor only, the bailee is only liable for gross neglect

Jones 32. 2d Ray. 913. Stra: 1099. 1 W. Bl: 158.

The neglect in this case must be gross as to furnish prima facie evidence of fraud in the bailee. The depositary may however subject himself by special agreement. for all accidents at all events.

2d Ray. 914, 1st Ray. 655. Stra: 1099. 4 Burr: 2300.

3 Reeve Hist. E. Law. 245. 394.

Jones says also, if the bailment was made by the bailee's voluntary offer, he is liable for the omission of ordinary care. This may be reasonable in a moral view but Mr. G. thinks it too refined for practice.

A distinction has been made in the books between a special agreement for a valuable consideration. and one without consideration. This dis-

distinction is abolished, and
Special agreement is bind
at any rate. The idea of a
valuable consideration in
this kind of bailment is in-
sistent for all cases where a
valuable consideration is re-
ceived, fall under the fifth

12 Mod. 487.
2 Ray. 916.

It has been holden where
goods are bailed are inclosed
in a chest locked, the bailee
can of a loss is liable only
the chest and not for the
contents. This doctrine is denied
by Holt who says that the bailee
may as easily protect the goods
as the chest. Mr. C. thinks the
time may or may not be the
He conceives it thus if the bailee
had no knowledge of the con-
tents of the chest, for he can
be presumed to contract for
that which he knew nothing

4 Co. 83.
1 Inst. 89.
Co B. 115.

Jones 52.
3 Atk. 47.
1 Bac. 237.

A special agreement to keep
safely and nothing more, does
not include any insurance against

2 Ray 916.
Jac & W. 130.
1 Pow. C. 248.
Mod. 34.

extraordinary events.

If the depositary detains the goods in violation of the contract the bailor may have his election of three different remedies. 1 Detinue - 2° Trover - 3. Assumpsit, 1 Com: 220. 1 Roll. 128. Co: 6. 781. founded on the contracts of bailment -

A depositary may reasonably use those goods, from which Jones. 114. advantage arises by Keeping -

The second kind of bailment Commodatum, is of 1 Pow. C. 249. Jones 91. 2 Ray. 916. B. N. P. 72. advantage to the bailee only and he is liable for slight neglect - In this case, using the goods as he uses his own is not sufficient care -

In case of theft the bailee is liable unless he proves extraordinary care - 1 Pow. 249. 2 Ray. 916. B. N. P. 72.

The rule is not the same in robbery - the presumption is in favor of the bailee -

It is a general rule that the borrower is liable, unless he proves extraordinary care - If the loss happens by theft, no inference is drawn one way or the other but the onus probandi is on the borrower -

W. G. thinks, Jones is not so w
rect in one rule respecting rob
& theft as he usually is. Pre
1 Ray. 916. 1 Pow. 251. Jones 51. tions may always be rebut
as he thinks, in these cases.

For if the goods are stolen & th
& robbery the borrower, W. G.
thinks, or any other bailee w
be liable and may be lia
for inevitable accident.

Where the contract of the
bailment is broken, the bail
is liable for all accidents
as if one hires a horse to
& one plans, and goes
1 Ray. 916. 17. 1 Pow. 253. 1 Bac. 244. he has deviated from the agr
ment & is liable for any
or accident.

Thus if there is a breach
trust, the bailee is liable
for inevitable accident. W
the goods are negligently ta
care of, and thereby are ine
tably destroyed, the bailee is
liable.

In this kind of bailment, lending and hiring is advantageous to both parties. The hirer in this as in all other bailees acquires a qualified property in the thing bailed. And the bailor an absolute right to the stipulated price. Jones 119. 2 Ray. 913.

The bailee in this case is bound to observe only ordinary care. Lt Holt in the case of Coggs and Bernard says he is liable for slight neglect, which is the same as in the case of a borrower. This doctrine is not a correct one and is virtually denied by Lt Holt in the same case where he makes a distinction between this case and that of a borrower. Besides it is but a dictum of his lordships. The proposition was derived from a work of Bracton on which it is convicted by Jones, that Lt Holt has put an erroneous construction. Besides it is but a dictum of his lordships. 2 Ray 916. B.N.P. 72. 10 Mod. 351. Jones 126

The case of Coggs and Bernard reported in 2d Raym. 912 contains the most Case on the subject of bailment and is cited by Mr. C. & almost every rule & it will be mentioned in future

3 Johns. 170. Where a Slave was delivered & a person to be kept or used and the bailee suffered the S. & go & the next village in the ing, when the Slave ran away it was held that the bailee was not responsible -

1 Doug. 720. 1 Saund. 321. 1 Pow. 531. It has been a question whether if a chattel is loaned for use, the person loaning it is obliged & keep it in repair? It is now decided that he is not.

The fourth Kind of Conveyance called Pawn or pledge is for the benefit of both parties - for a distinction between pawn and absolute sale. 1 Rum. Ab: 114.

The pawnee is liable only for ordinary neglect - 1 Pow. 252. Salk 526. 4 Com: 258.

Southcotes case 4 Co: 83. contradicts this doctrine -

The interest of the pawnee in the pledge is determined by a tender of the money due. 4 Co: 836. Salk 523. Cp: 625.

On a refusal to redeliver the goods after a tender or payment to the pawnee the pawnor may bring an action of trover for the goods, or assumpsit on the contract of bailment - 1 Bac: 237. Co Ja: 244 Salk 441. B.N.P. 71.

It seems by a number of authorities, that a refusal to redeliver the goods on payment is an indictable offence at Common Law - 4 Com: 258. Salk 522. 1 Bac: 240. 2 Bac: 210

Salk: 379. contra -

Sir Wm Jones says it is laid down as law in B.N.P. that after a time the goods cease to be a pledge & become a deposit. There is no such law in Bullen, nor does it seem to be correct that the goods become a deposit as in such case the bailee would be liable only for gross neglect which is contrary to the authorities.

On a tender the pawnee acquires an absolute property & the money due, and the pawnor or tenderor becomes a depositary.

B.N.P. 72.
1 Bac: 237.

In point of law the pawnee has a right to use the pawn which right is founded in the implied consent of the pawnor which assent is determined, & the using has a tendency to injure the goods.

4 Com: 253.
8 Bac 257.
Bro. 266.
1 Com: 221.

A finder of goods, without definition, is not a bailee, bailment is a delivery for some purpose; yet a finder

come within the reason & spirit
of the rule. 2d Holt says a finder
shall use ordinary diligence
and care. This Doctrine tho'
Comt is denied by some dicta Co: L. 219.
in the books, which declare that 1 Bac: 240.
he is liable for gross neglect Esp. Dig: 599
only. There is a wide differen
between the case of a finder
and that of a depositary. The
depositary is plainly volunta
rily to take charge of the goods
whereas the finder takes them
without any licence, and it
might Lead been laid to the
owners that they never had
been meddled with.

If goods thus found perish 1 Bum: 282
by neglect only, the finder will Salk 656
not be for them. Hob. 251

At Common law a finder 2 Bl. Rep. 1117.
of goods has no lien upon them 2 M. Bl: 251
for his expence and trouble Stra: 654
in keeping them, but Esp. Dig: 581
must deliver them on demand
to the owner.

By Stat. N.Y. Persons having strays cattle & sheep between the 1st of Nov. & 1st April in every year, shall within twenty days give notice to the town Clk. R.L. 149. And may detain them until he is paid the Clk's fees, and his own fair and reasonable charges in keeping them. Any person neglecting to give such notice forfeits to the owner 20/ for each neglect.

If not reclaimed before or on the 1st May the cattle may be sold at vendue by the person keeping them on his giving twenty days notice. And he must on demand pay the overplus to the owner. If not demanded within one year, the overplus to be paid to the overseers of the poor subject to a forfeiture of double the sum.

Qu. Can a finder maintain trover to recover any recompence for his trouble? 2 Dr. Bl. 258. There has been no direct decision. But some dicta.

Qu. Can a finder maintain trover? 1 Bulst. 312. Yelv. 69. Clearly he can in all cases. A refusal to deliver the goods, is not a conversion of them for he is bound to find the true owner.

Lien which bailees are entitled to.

A lien is a direct claim to or incumbrance upon some specific property, as a security for some debt or right.

A lien as thus defined, M. J. supposes, can exist only in the fourth and fifth classes of bailments. 4 Com. 258. Co Ja: 244. Salk. 522. Ep. D. 583. Pic Ch: 419.

Bailees of the fifth kind have a right to retain the goods till they are paid for the labor in doing done for which they are to be paid. And the bailee is always intitled to his pay, even from the true owner, when sent by a consignee. The rule extends to Innkeepers. 3 Bac 85. Rob. 42. 2 Ray. 732. 863 5 Burr 2826 5 Bac. 269. Salk. 654

But this lien is always lost by a voluntary delivery of the goods to the true owner. B. & D. 45. Salk. 388. 1 Co. 147. Ep. D. 584. 3 Bac: 186. Stra 557. 2 Rol. 85.

A tailor or other mechanic has a right to retain goods for his labor done to them. 1 Bac. 240. 8. Co. 147. Yelv. 67.

But. Quere: if they have been in the habit of doing otherwise, can they retain them without notice? 1 Bac. 240.

A common farmer who takes cattle or horses to pasture it is said has no lien upon them for the reasons of the other cases are not supposed to exist here.

Cro E. 197. B.N.P. 45.

A Captain of a ship has

Doug. 97. no lien upon her -

And in those cases where

5 Bac 271. 2 Roll 92. Yelv. 66. there is a lien it is taken away by special agreement.

A factor has a lien upon goods, and it extends not only to the balance due upon the particular goods retained but to a general balance due for factorage upon other

3 T.R. 119. goods - And it extends to the debt for which the goods are sold.

1 Burr 494. Amb. 254. 2 Bl. Rep. 1154. This rule extends only to factors.

A factor cannot pawn

1 T.R. 604 Stra. 1170. the goods of his principal to

1 H. Bl. 362. 7 T.R. 359. 1 East. 4. he can sell them -

The bailees of the third

1 Rol. Rep. 128. kind of bailment have a special property in the goods, but it can with no propriety be called a lien.

Law for the rights of strangers are affected by bailment.

It is laid down in the books that if one bails property the bailee is obliged or may deliver it back to the bailor. This rule as laid down Mr. G. thinks cannot be correct for the true owner of goods has always a right to the possession of them. If then one who has no right to the property bails it, the bailee, after action brot for the goods is obliged to deliver them to the true owner. Previous to a suit he may deliver them to the bailor. He is not obliged to search for the true owner. 1 Rol. 606. 1 Bac. 237. Bro. 242.

But it is said in this case that the personal representatives of the bailee are obliged to deliver to the true owner, upon satisfactory evidence offered. 1 Bac. 237 1 Rol. 607

As to the rights of bailees creditors who levy on the property as the bailees purchasers may be affected by the trust.

On the construction of the St. 13 El. which was made to prevent fraudulent conveyances, it is settled that creditors of bailees shall hold against the purchaser. for it is a fraud in the purchaser if the goods remain in the hands of the bailee. as it gives him a false credit.

3 Co 83. b. 2 Ba. 301. 2 T.R. 587. Cow. 432. 1 Atk. 180. 7 T.R. 71.

In this country subsequent creditors are considered the same as others.

In the English Law there is much said about subsequent creditors and very little law upon it.

If the want of immediate possession is a term of the contract no presumption of fraud is drawn from the possession.

2 T.R. 595. Ep. 541. Cow 432. 1 Atk 162.

When from the nature of the case immediate possession cannot be given, the rule is the same as in the last case.

2 T.R. 462. Ep. 542.

The Statute of Eliz. relates only
creditors and is in affirmance of
the common Law. Cow. 434.
1 Inst. 290. 3 Co. 82. 2 Bac. 602, when
it is said now that the Stat.
is not affirmatory of the
common Law, as it regards
subsequent creditors. but
Mansfield in Cowper held
every object of the Statute
was attainable at Common
Law. This transfer of goods
is made prima facie fraud in all
cases. And tho' the contract
might be fairly made, yet
from the tendency of such
contracts, the presumption
of fraud cannot be rebutted.

Cow. 434.
1 Inst. 290.
3 Co. 82.
2 Bac. 602.

2 T.R. 596.
7 T.R. 71

By the Stat. 21 Ja. 1. it is held
when goods are left in the hands
of a bankrupt to be disposed
of by him, creditors of the bank-
rupt will hold them against
the owner.

1 Vez. 348
1 Atk. 166
7 T.R. 22
8 T.R. 82
1 B&P. 89
Cow. 23

This Statute gives the creditors
the goods, not on the ground of fraud
but the false credit. To rebut the
fraud in this case is of no effect.
This is on the principle that the person
most in fault must suffer.

1 Vez. 365
1 Atk 180. 16
2 T.R. 46
2 T.R. 49

An actual manual delivery is not always necessary to convey property in personal goods.

7 T.R. 71.

The cases which arise on the Statute of Frauds have some qualification. It is necessary that the bankrupt should possess the goods as his own. And tho' the bankrupt may be his own agent & appear ostensibly as the owner yet the case is not within the Statute.

7 T.R. 315. Cowp. 239. Cath. 185.

There are many different opinions on this subject among Lawyers. Some suppose that the Statute erroneously that the creditor will hold in most cases.

3 J. & M. 44.

As a general rule if from the nature of the bailment his business his possession furnishes no evidence of ownership, the creditor will not hold.

D.M. 185. D.M. 318. 3 D. 102.

In cases of bailment to which this Statute does not extend, the general rule of the common law is, that the bailor will hold the goods, unless the goods are sold in market overt.

Will. 0. Stra. 1107. Cath. 44. Cath. Dan. 260.

The maxim in these cases is caveat emptor. The rule has been found inconvenient & Judges have expressed a wish that it was altered. 2 T.R. 376 4 T.R. 640

Mr. G. thinks the rule as well framed as it can be. It is impossible that inconveniencies will not arise.

There is an exception to this rule in case of bank notes, and transferring medium, and the reason is not according to L. Holt opinion, because the money cannot be identified, for many times bank notes can be. The true reason is founded in policy. It is disadvantageous to impede the circulating medium of any free country. 1 Burr. 452 3 Burr. 1564 1 Bl. Rep. 48 Salk. 126

An Habeas is in substance the same as the Statute 13 Eliz.

Our courts have always allowed the presumption of fraud to be rebutted. Here therefore the sale is not fraudulent per se.

Tho the grant may be

debtor, yet the vendee loses the property, by reason of the false credit given.

It is not universally true that when the bailee is insolvent the creditor will hold the goods against the bailor for it is reasonable the goods should be responsible by the bailee so as to give him a false credit.

Doug 306
1 Bl. R. 97.
Hodges.

But where a box of goods is left in the hands of the bailee to keep, and the bailee breaks open the box and sells the goods the bailor in this case will have them against the purchaser.

This is exemplified by the case of Brown & Pendleton decided in New London county several years since. This is the only case on the subject in Connecticut.

Where cows are let the bailor will hold. And where a horse is let & the bailee sells him, or a creditor levies the bailor will hold it.

for here the possession does not furnish clear and decisive evidence of ownership. Policy also operates - And it is a general rule adopted by our courts, that if the possession furnishes clear and decisive evidence of ownership, the creditor or purchaser will hold - but if it does not furnish such evidence the bailor will hold.

It has been a question whether the interest of the bailee, when the creditor knows of the bailment, may be levied upon and held against the bailee. There is no decision in point, but from some opinions it would seem that the creditor would hold. Mr. Gould does not think this good law and supposes the principles applicable to mortgages do not obtain to personal chattels. 7 T.R. 11. 12

Remedies of the bailor & bailee & inforce their rights.

It is a general rule that the bailor, as he has the general property, may have trespass, trover, or any other proper action against a stranger who does an injury to the goods in the hands of the bailee.

5 Bac 134. Vin. 260. Latch 214.

And this rule holds as well when the bailor never had possession as when he has.

Yelv 198. 1 Ro. 498. 2 Rol. 569.

In case of real property the rule is different. There can be maintained only by the person who has the possession in fact of the land.

1 Johns. 511.

If a coach an bailed for hire it has been a question whether the bailor can maintain an action against a stranger during the time, for an injury done to them during that time. It has been decided in modern cases that he cannot, but may after the expiration the term.

4 T.R. 489. 7 T.R. 480. 7 T.R. 9. 6 T.R. 2 T.R.

but his crop cannot be taken after the expiration of the term. It must be known and the convenience lies after the term has expired, and provided he can have it, send them.

If goods bailed to B. and the bailor gives another this does not transfer the property to the donee without delivery - for here there is neither an actual or constructive possession. This at 2 Strange 955. Ek. 577. 5 Barn 164. acts however will in this case Cow. 294 amount to a delivery.

To make a valid gift, there must be an immediate possession of the thing delivered. If I say to B. I will give you the corn growing in that field belonging to A. this is not sufficient without delivery. If B. when the corn is ripe, enters the field & cuts and carries it away, he will be considered as trespasser. 2 John. 5.

If the bailee give the goods to a stranger in violation of his trust, the bailor can bring action

trespass nor trover in the
first instance without a
demand and refusal: it who
can it may be brot - But the
bailor must show suffic
5 Bac. 184. evidence of ownership.
1 Bac. 217.
2 Ray. 867.
1 Rol. 606. Most bailees, and N.
concurs all may maint
trespass trover or any other
5 Bac. 185. per action for a injury done
Wms 2 262
2 Ray 2 76. & the goods in his. Lands, h
1 Salk 143.
7 N.A. 93. stranger -

It is said in the old bo
that the ground of the bailee
right to sue the wrong doe
is his own liability, now th
bailor - Wms Ld Hardy this is not
& cannot be the reason or
1 Inst. 89. least the only reason - and
5 Bac. 184.
7 N.R. 93. wholly indefensible upon eve
principle. The true ground is
the special property which
has in the goods bailed - this
7 TR. 392. property is nothing more tha
Cowp. 112.
1 Bac 240. a bare right of possession.
Ejc. 597.

When finder of goods, m
bring an action for the goods,
out of his possession - For a finder h
right to possession against all but
rightful owner -

And it is settled that a servant can maintain an action against a stranger for a loss of goods by them tho' he may not be liable to the master.

4 Mod. 404. Com. R. 607. 12 Mod. 54. Comb. 264. 1 Ld. R. 338

In Bullen it is laid down that special property is sufficient to maintain trover.

Again an uncertificated bankrupt who can hold no property, may maintain an action for property to which he has a right of possession.

7 T.R. 391.

It is clear then for the special property entitles the bailee to an action. Reasons of policy operate to give the bailee the right. A speedy remedy is many times required and the bailor may be at a distance.

An Auctioneer may maintain an action on the contract of sale in his own name, tho it was known at the time that he was not the owner of the goods. This is not generally the case with bailiffs & servants.

1 W. Bl. 81. 2 W. Bl. 59. B. N. P. 13.

When the bailor and bailee have both a right to sue for the full value of the goods a recovery of the full value will bar any other action for that purpose, but the bailee may have an action for the special damage done to him for the injury distinct. And one in this case does not bar the other by whomsoever brot.

5 Bac 135. 2 Wils. 203. 1 Rin 22. 13 Co. 69.

W. G. supposes an action commenced by either the bailor or bailee, when both have the right, attaches to him who first commences the suit.

Latch 127. 3 Bac. 559.

This is in pursuance of a general rule of law, that when two have equal rights, the first claimant has the priority.

3 Co. 44. 9 Geo 52. 5 Geo. 873. 1 Rol. 808. 2 Ray. 1217. 3 Leo. 124. 2 Salk. 11. Yelv. 68.

If the bailor commences an action against the wrongdoer W. G. thinks he waives his right against the bailee for W. G. has already supposed this action barred the bailees action against the wrongdoer and the bailee cannot be liable

This idea is analogous to the case of a rescue, when if the debtor elects his remedy against the rescuer, his action against the sheriff is barred ~~by~~ 8 L. 610
recovery.

There is some analogy between this case and that when a person has two remedies if he selects one, he is barred of the other. 8 Salk. 248.

After the bailee has commenced an action against the wrong-doer, he is liable to the bailor.

If the bailee delivers the goods to another contrary to the orders or contract with the bailor, or in violation of his duty, trover will lie against him by the bailor. And this is the general remedy. As a general rule trespass will not lie in this case, tho there is one case.

If the bailee destroy the thing bailed, he is liable in

trespass, for say the books, by destruction the bailee defeats the contract of bailment. Rowe in these cases answers all the purposes.

1 Bac. 237.
4 Com. 258.
3 N.P. 72.
S. Co. 146.
1 Mut. 57.
5 Co. 13. B.
2 T.R. 465.
2 Roll 555.

A discharge of all covenants is of more extensive signification than a discharge of all demands. Co Litt 292 2 Lev. 206.

Thus in cases when the covenantor is discharged by the acts of the covenantee. This is a good defence in all cases. 8 Co. 91.

A contract of a lower nature is merged in one of a higher nature. 6 Co. 45.

Where the claims are of equal nature and for the same sum, the latter claim merges the former. Cro J. 579. Cro El.

Where there is a contract put into writing which was good by parol the former parol contract is not destroyed. Pow. Con. 218.

In one point the widow and equity are different.

Parol evidence will not be admitted to contradict a writing, yet to rebut an equity it may. 2 Ves. 299. 6 Br. P.C. 580

Many things which are not strictly releases may operate as such & should as such be pleaded: As a covenant not to sue on a debt -

1 John Ca: 411. When the obligor of a bond after notice of assignment, pleaded a release from the obligee & the release & an assignment by the assignee to the use of the obligee, and the Plaintiff replied the prior assignment the replication was good & the release a nullity.

Full payment.

A plea of full payment admits the original cause of action & can operate only in case of contracts.

Full payment by the common law cannot be pleaded to a bond, on the ground that parol testimony must be admitted. And the evidence must be of as high a nature as the bond. This is altered by statute. 1 R.L. 346.

But yet a tender on a bond with a penalty does not bar the action on said bond. 2 Johns. 24.

A payment for which a receipt is given to a person in his own name, is evidence of a payment on his own account, and that it was not made on account of a debt due from him and another tho' there do not appear any directions to apply it to the separate account, especially if such payment be for the exact amount of a balance due from himself, and would not pay the joint debt. 3 Cains 14.

Infancy.

Is a good plea to an action on a personal contract.

But in an action against two defendants, when one is brought into court and the return not taken; the Defendant in court cannot under the general issue give in evidence the infancy of his co-defendant. 2 Johns. 279.

The plea of infancy is a personal privilege, of which the party alone can avail himself. Vi.

If the contract is for necessaries, the Plaintiff replies this over, and if proved, will recover. But this rule applies only to contracts; it is no defence against torts, as for them infants are liable.

This subject is fully treated of under the title of Parent and Child. Quod vide.

Illegality of Contracts -

Illegal consideration may be pleaded to any contract, even to a bond or sealed instrument. Collins v Blanton. 2 Wills 341.

Usury is a good defence against an action. And is of two kinds. One when the original bargain is good but usury is afterwards reserved. This is no defence to an action on the original contract. But the victim is liable on the statute for receiving too much.

But if the usurious reservation is made at the time of the making of the contract it will avoid the obligation and is a good & plea a lawful defence to the action.

If the contract is usurious on the face of it, a demurrer is proper. If it does not appear but is concealed by a bond or note, it must be pleaded in bar and may be proved by parol evidence.

It is necessary to allege a covenant agreement in the plea.

If the plea is good the Plaintiff has no other remedy than a traverse. if it does not contain the necessary allegations a demurrer is the proper method of avoidance.

A composition being made among all the creditors to take up with less than the real demand or sum is a bar to the action when the agreement has been complied with by the debtor on his part.

Duress is a good defence to even Species of personal actions.

Fraud in a contract is a good defence to an action on the contract. When there is a partial fraud or a mere cheat it is no defence but an action may be brought to recover damages. But when the Plff is a bankrupt Chancery will make a set off.

2. Recover such sum their contracts ought to be considered as being such as the parties never intended to make. The courts now proceed upon the idea that something has been received.

The next class of cases are those where there is a complete and total failure of no compensation been received. In England an action may be brot to recover the money paid on such contract, but it cannot be pleaded to the action on the original contract.

No offset can be made in chancery until there is a judgment obtained in a court of law.

Fraud is one species of failure which is a good defence both in England and in this country. Where there is fraud in the execution & not in the consideration. The plea in this case non est factum.

Where a suit is brot on an
indemnifying bond & sues
on Lamb's the proper plea
is non damnificatus. Here
the Plaintiff must reply &
shew wherein he has been da-
nified.

Cautt. 374.

Actions on Torts.

Torts may be injuries to men's reputations, to their persons or property. There injuries will be considered in order.

Slander is properly defaming another by words.

Slander is of two kinds,
1 words actionable in themselves without any damage proven
2 words not actionable in themselves but which occasion Special damage.

What words are actionable?

I. All words charging a person with a crime, when the punishment exceeds a fine

II. All words which directly tend to destroy a persons livelihood

III. All words against magistrates in their official capacity tending to impeach them.

IV. All words charging a person with having a loathsome or infectious disease.

Any words which in the least attack a persons character are actionable if Special Damage is proved to have arisen in consequence of them.

It has been questioned whether words charging a crime punished only by fine were actionable in themselves.

Lord C. thinks from the cases this rule may be drawn. Viz: Wherever the crime charged affects a mans reputation & is punished by fine the words are actionable.

Malice.

There is some distinction between legal malice and that which is deemed malice in common conversation. Legal malice is better understood by the Latin word malitia than by the english term.

The truth may always be given in evidence tho' the

malice may be never so great - and when the charge is proven, tho' never so malicious, it is a complete defence -

The charge therefore must be not only malicious but false, or no recovery can be had -

Malice must be proved, but if words actionable in themselves be proved, the law implies malice -

Slander is a crime at common law, and not punishable criminally as such - Where a defendant wishes to justify by giving the truth in evidence, he must plead it or give notice in the general issue -

Where words actionable in themselves are spoken, it is not necessary to state special damage to entitle to a recovery - but special damage may be stated - and must be if you wish to prove it -

If one recovery is had on words actionable in themselves no other action will lie for subsequent damages - for the former recovery is pleaded & the in satisfaction of the whole - but for words not actionable a recovery may be had as often as damages arise -

It has been said that to charge a man with being a liar, rascal &c is not actionable, because words of heat & passion - this is not the true ground for most actionable words may be termed words of heat & passion The true ground is that they do not charge a crime punishable by law.

There is some obscurity in the cases in the books on the law of slander - Ancient was held that words were to be construed in mitiori sensu this was to discourage actions of this kind but it being a discouragement for men to accuse themselves, it was introduced

& question with. The rule then you was adopted, that words should be construed in severiori sensu.

It was once held that if the reporter of a charge would prove the author he was not liable. But as it would introduce a dangerous doctrine and the law would be evaded a different rule is now adopted.

It has however been held in a modern case that if a person reports a charge as coming from another & the other did report it & is a responsible person, this acquits the latter.

Charging a person with acts that amount to treason, or using words which if by it an action ables. Cro Car 603 1 Rol. Ab. 63 1 Salk 694

The rule is the same as it reports a charge of murder. Cro Jac 428 1 Vent. 117

Charging a person with perjury is actionable, but there has been some dispute as to what amounts to perjury.

In an action for saying of another "he is perjured" it is enough to prove the words spoken that they were spoken in a judicial court, the competency of that court to administer an oath need not be proven, but its incompetency must appear from the Defendant -

2 Cains 91.

The meaning of the words as spoken are to be considered -

It is not necessary that the word perjury should be used - any words which import perjury are actionable -

If a man say of another "you swore to a lie for which you now stand indicted" it is actionable -

3 Cains 73.

To say of a person, "he has sworn falsely" or "that he has taken a false oath" is "to give Jamaica's court" or "that he is falsely and maliciously charged on me the crime of perjury" is not actionable -

2 Johns. Ca

In consideration saying the oath must be taken in a judicial proceeding — 4 Co. 15. 3 Lev. 166.

What has been said with us ~~is~~ to the preceding cases will apply to the others. As to changes of theft generally. 1 Rol. 65. Cro Ja: 114.

"Sanin Bakley is a damned rogue" were held not to be actionable, not being spoken of him in his official capacity of Justice of the peace. 1 John Ca: 124

Words spoken of a person in relation to his office of Sheriff, and amounting to a charge of malpractice, are actionable. Vin. 330.

Where words otherwise actionable were explained at the time by a reference to a known translation, then are to be construed accordingly, and being so explained, they were held not to be actionable. Vin. 279.

"He has been guilty of felony" has been sometimes held actionable & at others not so. 5 Mod. 88. 2 Ld Ray. 959

Charging a woman with being a whore is not actionable, except in London where they are punished by carting round the street. 1 Rol. 36

Words charging a married woman with adultery, are not actionable in themselves, but the Plaintiff must allege and prove some special damage
2 Roby. 115. in consequence of the speaking of the words.

Any thing that tends to destroy
Stra: 946. a persons livelihood or the benefits of his profession, is action
2 Rol 54. 119. 2 Rud. 28. able.

When the action is sustained
1 Lev. 280 Cro Ja: 65. on account of the particular situation of the person, his situation or profession, must be averred in the declaration.

As to words charging a crime which will banish a man
Cro Ja: 144, 1 Rol. 44. from society, they must be spoken in the present tense. If they are spoken in the past tense they are not actionable.

When an action is brot on
Stra: 666. 3 N.P. 7. words not actionable in themselves, special damages must be averred in the declaration and in this case other damages than those laid may be proved.

Words are to be understood
according to their meaning in the place spoken.

Local definitions are much more frequent in England than in this country. Cant phrases may constitute slander when they are understood. 1 Rol. 26.

Words prima facie import no malice may be proved not to be maliciously spoken. This depends upon the circumstances of the case and the manner the words were spoken. B.N.P. 5.

It depends upon the motive the words were spoken. Cro Ja: 91. 1 Leo. 82.

Where words are drawn out by means of the person claiming to be injured, they are not actionable no recovery can be had. Cro El: 292

Reporting a story as received from another is no excuse. Tho' there has been a late case which militates this rule. 4 Bac 510. Esp Rep.

And in N.Y. it has been decided 1 Pen:

No oblique method of conveying a slander will evade an action. 1 Rol 49. 12 Co. 134. 1 Vent. 59. 1 Leo. 277.

The person of whom the words are spoken must be certain or no action will lie. Cro Ja:

Counsel are not liable for words spoken in advocating the Clients cause in Court, when the words are material & the false. But if immaterial to the cause he is liable.

1 Rol 87, 33. 8 Co 3: 92. Any thing respecting a suit in Court is not actionable but the party injured has his remedy in another way.

D. N. P. 9. Other words than those laid in the declaration may be proved not to intitle to recovery, but to shew malice and aggravate damages.

Provocation may be proved in justification or mitigation of damages, but will never be a perfect and complete justification.

Declaration.

The first thing mentions in the declaration is that the Plaintiff has always been of good name and fame. This is formal but sometimes necessary. It must be in particular words that the Plaintiff was indicted of the crime charged & guilty of it.

If the action is brot by officers or professional men as Peake. 169. Salk. it must be averred that he was in office &c at the time the words are spoken. Cro Car. 282.

If it appears what the Plff was in the words spoken, and they are recited in the declaration it is sufficient. All that is necessary is that it appear in the declaration. 1 Wils. 280.

Where the Plff's character is stated, it must be averred that the words were published. The common method is to state it in the hearing of divers persons. Cro E. 281. 1 Sid. 199. 486 Cro Ja: 39

It must be stated that the words were spoken falsely & maliciously & that they were false & malicious.

It is said that if the words were false it is sufficient without malicious - Noy 45 q.

By this it is not to be inferred that malice is not necessary.

It is necessary to aver the words in the declaration as spoken, tho a slight variation is not material.

Cro E. 445. Hard. 305.

The Defendant may prove that the Plff. character is bad and the Plff. may prove it good tho' the Defendant admits it. About this there has been some dispute.

When the words are spoken of a third person in conversation it must be averred in the declaration that the conversation was respecting the Plaintiff.

Cro Car. 473. Cro J. 125. 19. Cro Car. 473. Col 85.

If the words spoken relate to another fact, that fact must be stated and averred. As if he should say of B. "he is as great a thief as there is in Litchfield" it must be averred that there are thieves in Litchfield.

Cro E. 380.

Innuendos never extend the meaning of words. They are only useful in ascertaining the person time and person meant.

If a finder innocently or on reasonable proof delivers the goods to a wrong person, he will still be liable to the true owner. But if he is sued and subjected by person not the owner, M. G. apprehends he would not be subjected to the true owner. Judge Reeve is of a contrary opinion.

1 T.R. 125. Doug. 161. Cook B.L. 170. 1 Wm. Bl. 669. 682.

There are cases analogous to this to be found. Executors & Adm^rs and "foreign attachment." But this doctrine is denied by the Connecticut court. "Quere? Is it not justly? The owner of property has a general rule has a right to take it when he can find it."

Ibid.

If the pawnor after a tender and refusal recover in trover, the pawnee may recover the money due, by assumpsit, having made a demand.

1 Bulst. 293. 1 Ban: 238.

A pawn is merely a security for the payment of the debt. Of course the debt is not extinguished by a loss or destruction of the pawn.

Selo. 179. Co Lit. 209. Salk. 523. 4 Com: 258

A pawnee may sue for his debt
al tho he has the pawn safe in his
possession unless there is a special
agreement to the contrary.

Com: 258.
Hen. 619.
2 Sid. 86.
Leo. 115.
Yelv. 179.

If the debt is not paid at the
day the pledge becomes absolute
in the pawnee, and the pawnor
as in mortgages, has an equity of
redemption.

4 Com: 258.
Co Lit. 205.
3 Atk 395.
2 Ves. 691. 698.
1 Ves. Sr. 114.

But after the day of payment
has elapsed the pawnee may sell
the property subject to the equity
of redemption for which he is liable
but the property vests absolutely
in the purchaser.

If the pawn is sold for more
than the debt N.Y. supposes the
surplus in the hands of the pawnee
may be recovered by the pawnor
in an action of indebitatus assumpsit as that
will lie in all cases where a
bill in equity would if the re-
medy is appropriate, and in this
case it is the only remedy.

1 Bac: 238.
Co. Lit. 205.

A pawnee does not lose his right
to the pledge by suing for his debt
til the debt is actually satisfied
tho' other property may have
been attached. This is analagous
to the case of mortgages where
the mortgagee may use all his remedies
at once.

Action of account -

This action altho now almost out of use in England is of frequent occurrence in this country - To sustain this action there must be a privity between the Plaintiff and Defendant as to property -

By Stat. N.Y. when any person is bound to account, as guardian, bailiff, receiver or otherwise & any other & will not willingly account - a writ to account shall be issued out - If the Defts being summoned do not appear at the return of the writ or if it be returned that the Deft has nothing, then he is attached by his body & come & make account. If it be returned that the Deft is not found, the process may be pursued to exigent & outlawry. When Defendant appears auditors are appointed - If the Deft is found in arrears & cannot pay, he is committed & so continues till he satisfies the Demand with costs - 1 R.L. 94

If the Sheriff or Jailor
suffer him to escape, he is
answerable for the debt
and damages -

1 R.L. 95. If the auditors find a
surplusage due from the
Plaintiff to the Defendant
the Defendt has judgt for the
same with costs, unless
the suit is brot by Executor
or admrs in right of their
tator or intestate - They pay
no costs - And the Deft shall
have execution for the
same -

ibid. The auditors examine
parties under oath, and
receive such compensation
as the Court think just
reasonable -

ibid. One joint tenant may
have this action against
another so may a tenant
in common -

1 R.L. 536. This action may be brot
by or against executors & ad-
ministrators, when it might
have been by their testator or
intestate -

but no Exr or admr is to be cited to account except by the inventory, unless by a party interested.

R.L.536.

When there is an obligation to account, the action may be brot on the obligation or an action of account may be brot.

The proper plea in this action is that the Defendt never was bailiff &c. This goes to the jury. If they find he never was bailiff, then is an end to the cause.

The Deft if he was bailiff or receiver may plead settlement or any thing to shew there was nothing due.

If the award of the auditors is accepted by the Court, judgment is rendered of course.

How the award may be set aside.

The award of the auditors may be set aside when there appears partiality, or corruption in the auditors.

It may be set aside for a mistake. But when there is only a miscalculation, the Court may come in & correct the mistake, and the award will not be vitiated.

Can award may be set for the admission of improper testimony.

This may be either as to the person admitted, or the points proven. This is brought up to the Court by remonstrance. And the Auditors are the only witnesses to shew what was the evidence admitted.

1 Ca: Ca: in error. 96. If an Executor or trustee be robbed of money, it is a good answer to a bill for an account.

If the executor or trustee be dead, his personal representative may avail himself of it, tho' it want the corroboration of the oath of him whom he represents.

Defences to the foregoing actions -

Tender

To defend to be an offer to pay a debt upon a sum certain -

This is a good plea where the debt or damages are certain, but in no other case. It is therefore good in no case of tort -

Where there is a breach of a contract to perform a collateral act, there can be no tender of money but there may be a performance of the agreement -

A tender of money, therefore in those cases, is no plea

Where the Plaintiff prevents the Defendant from doing the act - he may tender himself to do it - And may recover damages of the Plaintiff - In Connecticut the damages are assessed by the jury; in England, the contract is the rule of damages -

Collateral articles.

Where collateral articles are to be delivered, they may be tendered, the same as money. After the articles are tendered the tenderor is not obliged to retake them. But if he does for the purpose of preserving them, it is not a tortious taking. but he is considered as Bailee in this case.

Trover will not lie in this case without a demand of the articles.

If the contract is to pay a sum of money, and there is a tender and refusal the tenderor must retake the money for the law makes him bailee in this case. for here there is not that trouble in taking care of or keeping the money, as in collateral articles. The tenderor must be always ready to pay the money upon demand, or he looses the benefit of his tender

except the interest accruing from the time of the tender to the time of the demand.

If the tenderee, after tender sue before demand, this amounts to a demand and the tenderee must tender the money in court or pay the money into court on the common rules

If the Plaintiff recovers no more than the sum tendered - pays costs to the Defendant.

The tenderee being a mere bailee in this case if the money is lost without his fault the tenderee must loose it; But if the tenderee is negligent, like all other bailees he must account for it.

If the tenderee be out of the realm as it is ex[illegible] in England / or out of the U.S. in this country / the tender

may be at the last place of abode - and if you can prove that you have been always ready to pay the money it is a good tender.

The operation of a tender upon a pledge is this. that the moment the money for which the thing was pledged, is tendered, the pledge is destroyed or the lien upon it is lost.

5 Bac. 14. At Com. law when the damages are uncertain, no tender can be made.

R 2. 197. The Stat of N.Y. provides that when unlawful acts or irregularities have been committed in distraining for rent, a tender of amends before action brot will bar the action.

R 2. 357. In trespass quare clausum fregit also the defendant may disclaim & tender sufficient amends upon action brot, & bar a recovery.

machines and tools of a man trade are not allowed to be put into Court in an action of trover - 1 Johns: 65.

If the Defendant after verdict, tender the amount recovered with costs up to the time, the Court will order further proceedings to be stayed. Vid. 506.

An averment of being "ready and prepared to execute a conveyance according &c but that the Defendant did not attend, and has refused" is a sufficient stating of an offer to perform by the Plaintiff. 1 Cairns 4

On an agreement to accept notes in payment of goods sold, if before delivery the notes turn out bad & tender and refusal of them is no payment, unless the vendor agree to run the risk of them being paid. 2 Cairns 11

A tender on a bond with a penalty, does not bar
2 Colm: 24. the action on such bond.

If a man says he will not receive the money this tendered, it has been said, this is sufficient without the actual tender provided the money is ready for a tender. But I do not find no authority for this & inclining to think the mere dictum of elementary authors -

In England no money not made good by proclamation will make a good tender.

What foreign coins are good in this country is regulated by a Statute of the
- Co. 114. United States -
- 2 Lit. 207. Coppers are not a good tender in England except for change tho' current by proclamation.

Cents may be considered in the same point of view in this country, they are good only as change -

Bank bills.

are not, as such a good tender - But if a man presents bills to another & says if you have any objections to the bills, you shall have gold & silver - if the person makes no objection, judge B. supposes it would be considered as a good tender - And that the authorities have gone as far as so to consider it. D&B. 5 Barb.

There is a rule laid down in the books that when an insufficient sum is tendered and accepted, the tenderee has no remedy. This seems to be a strange doctrine, if it is meant that the tenderee takes it knowing it to be insufficient by this mistake - But if he takes it as payment in full - or is willing to take a less sum for a given time, this rule may be correct. But if considered in the other point of view it is unjust & unreasonable.

Upon the same principle it has been said that if counter-

fait money is tendered and received it is a good tender. This doctrine has been overruled in Connecticut.

In N.Y. also it has been decided 19 John: 453. that a forged bill or a bill which proves to be of no value is no payment, and that the party may treat it as a nullity and resort to his original demand.

Manner of making a tender.

It is a general rule that the tenderor must declare for what he tenders. It may be made by giving money in a bag, but there must be proof that the money was in the bag.

He must make an offer of the money and hold it out in his hand & inform the tenderee the money is ready. I.R. supposes it is not necessary to put it out of his possession, as for instance to put in on a table &c

The tender must be made to the person of the creditor if he can be found - if not, it must be made at the residence of the tenderer at the time of the tender.

If the creditor has gone a journey or happens to be gone the tender may be made at his house - If he is out of the country, proof that the money was ready at the time of payment amounts to a tender -

If he has left a known agent the tender must be made to him -

There is one exception to the general rule that the tender must be made to the person - Rents for lands may be tendered at the farm house. Co Lit. 211.
or dwelling house of the tenant This rule does not apply in this country -

Where bulky articles are to be delivered & no place mentioned, it must be delivered at the place of abode of the

of the tenderee at the time of the contract - the tenderor is not obliged to seek the person of the tenderee: But if the removal is such that it is not more inconvenient than the place of abode at the time of the contract, the last place of abode is the proper place unless the creditor directs previous to the tender, that it shall be delivered at the former place of abode -

Time and place of tender.

If the time and place be both fixed, the parties are to be regulated by it - But if it falls on or before such a time, the tender must be made on the last day - And unless the creditor is present in this case the rule applies to the place fixed -

Plowd. 172. 5 Co. 115. Cro E. 75. 2 Lev. 104. Cro E. 14. 1 Roll. 444.

The tender must be made at the uttermost convenient part of the day - If the creditor is not present - This convenient time is such that the tenderor may be secure of the

ent before dark.

If there is no plain time the tender is good at any time after the contract is made, and before the day of payment. Co Lit. 210.

Or if a plain is fixed, and they happen omit then the tender may be made. Latch 7 O. 2 Lev. 209. 5 Co. 115. Co Lit. 108.

Notice must be given on demand, or when on or before just a day. 8 Co. 92. 5 Bac 14.

Operation of tender.

The rule in England is that a tender operates as a performance of the contract: Therefore according to this rule, if a contract to build a house & tenders himself to build it. he will recover for the building.

Where a bond is made payable to a person and his assigns, & the bond is assigned, tender is good to the assignee. And indeed it is uncertain whether it is not necessary to be made to the assignee.

A tender operates to discharge a person as much as tho' there was an actual performance of the contract. This rigid rule in England has extended to cases where the collateral thing & the main is prohibited from performance, but tender saves it & it is upon the condition of sum of the contract is the rule of damages.

Cro J. 245. 2 Saund. 352. 1 Salk. 75. 5-23- 1 Ray. 964. Str. 777.

In cont- damages are recovered instead of the amount of the contract.

Where the contract is to deliver one articles, & there is an agreement for the delivery of another, contrary to the terms of the agreement, the latter will never make a good tender, unless received as a satisfaction. The remedy in this case must be an action on the breach of the covenant or agreement. And the tender must be according to the terms of the agreement.

Where there is a penalty in the bond, if the tender is made by the time, the penalty is discharged. Cas Tk 133. R. L. 1. 347.

Where the bond is for such a sum and a condition is annexed that if it is paid by such a day a certain sum is to be deducted. Here if the money is tendered and refused an action cannot be brot on the bond but an action on the case for the money (as Judge Thinks) may be brought.

Our courts have established this rule that the obligor must not be put to more trouble or inconvenience by the assignment than he otherwise would. But if as convenient and notice is given he must tender it to the assignee or his agent or attorney.

The assignee may always procure a tender by appointing an agent or attorney. This is the law of Connecticut.

1 John. Ca: 411. When the obligor of a bond after notice of its being assigned took a release from the obligee and pleaded the release to an action brot by the assignee in the name of the obligee and the Plaintiff replied the prior assignment the replication was held good, and the release a nullity —

Pleading a tender.

It must be stated in the plea the day the tender was made, that the money was to be paid on a certain day. If the creditor was absent J.R. supposes this need not be mentioned. If the tender was made at his house it is sufficient to say the tender was made to him.

In this case it would be sufficient to say that he was ready to pay or tender the money. 1 Camy 45.

If the tender is made to the creditor & he refuse, the refusal must be stated in the plea. And if he is absent the absence must be stated as in this case you cannot state a refusal.

Where the tender is on or before such a day and the creditor is present at the place, the tender may be made at any time, but it must be stated in the plea that the tender was made at such a time, he being present.

If the tender is made in mo-
ney, you must state in your
plea not only that you have
tendered, but that you have
always been ready and still
are ready to tender it in Court

1 Salk 324.
Cro Jac. 423.
3 Lev. 104.
1 Sid. 13.
2 Vent. 109.
2 Saund. 152.
Cro E. 889.
Cro E. 755.
1 Show. 129.
2 Show. 143.
9 Co. 79.

If the Plaintiff wishes to
avail himself of a subsequent
demand he must state it in
his replication - A traverse
in this case is not good.

Actions for injuries to the person.

Assault and battery.

Out of a assault & battery may arise two suits. One for the injury to the public, the other for the private injury.

When the injury is done by several persons the action may be brot against any or all of them. But an action cannot be brot twice.

Words never amount to an assault and battery. Nor can they justify either. But they may be given in evidence in mitigation of damages.

To constitute an assault a touching of the body is not necessary. but an apparent attempt or appearance of it where it can be done by reason of the proximity of the person.

1 Salk. 384. 1 Raw. 133.

To constitute a battery there must be an actual touching of the body. This, if done maliciously, tho never so slight is a battery.

If an injury is accidentally done in performing a lawful act an action will not lie, but if done in furtherance of a unlawful act, its being accidental
13. St. P. 15. 16.
1 Stra: 526. is no excuse -

Neither a private action can be given in evidence on a public prosecution for assault & battery nor a public prosecution in a private action -

If two persons agree to go out and fight, and one receives a severe beating, he may sue the other for the injury notwithstanding the agreement.

J.R. is of opinion there ought to be no recovery in this case upon this principle that both agreed to break the law, and if they will voluntarily do that which is unlawful, they must abide the consequences.
13. St. P. 16.

Mode of pleading.

When the assault and battery is denied the general issue must be pleaded - When the circumstances amount to a justification they should be specially pleaded

or give notice of under the general issue - This is the case also when the defendant was bound & do the act -

Justification may be pleaded in defence, as son d'assault demesne - this is upon the principle of self defence - This however must not extend so far as to make the Defendant the aggressor - The replication in this case is that it was from the Defendants own wrong act - 1 Salk. 642 Sid. 246 Carth. 280.

Officers who have lawful warrants may justify arrests but they must not beat and wound unnecessarily - If an action is brot the Officer may plead this in justification - And if there was a beating he may plead not guilty as to this and that it was necessary to beat the Plaintiff in order to arrest him - arising from his resistance -

By Statute of N.Y. actions brot against Sheriffs &c. for acts done by virtue of their Offices are declared local 1 R.L. 233

And they may plead the general issue and give the special matter in evidence. And if the Plaintiff fail or discontinue he shall pay double costs to the Defendant.

1 R. L. 234.

Persons sued for acts done by authority of any statute may plead not guilty or that the thing was done by authority of such statute, without specifying any other matter or circumstance contained in such statute. And the Plff may reply *de injuria sua propria*. On a verdict for defendant or nonsuit of Plff. after appearance the Defendant will recover treble his damages with his costs.

Ibid.

A child may justify a defence in favor of his father and vice versa & so of other relations.

A master may correct his servant & a parent his child, but if the correction is excessive, an action will lie.

An assault and battery may be made in defence of property of any kind whether real or personal but this must be before possession is gained by the person beaten. 1 Salk. 641

A former recovery for an assault and battery is a bar to any future recovery for subsequent damages. 1 Salk. 11.

When the defendant justifies as to part and pleads not guilty as to the rest and both issues are found against them is but one rule of damages and only one execution. The rule is the same when there are several defendants, there is but one judgment against the whole.

If the jury sever the damages and find so much against A. and so much against B., the Plaintiff may move in court for judgment. But the Defts cannot. but the Plff may file B. N. P. 20. take execution for any or all against one or all.

There are cases where there may be several judgments & several executions may issue this may happen where those distinct batteries are committed by different persons but joined in one declaration.

2 Aa: 122. 11. Co. 5. b. 7. Cro Ja: 350. 1. Cath. 19.

Where a maim has been made upon a person, and the tries have seen the wound damages may be increased.

B. N. P. 21.

In the action of assault and battery the Statute of limitation in N. Y. is four years. In connecticut three.

1 R. L. 564.

A right of privilege in a cargo does not give such an interest in the cargo as will enable the purchaser of it to maintain trover, if the consignee has not assented to the selection of those parts which are purchased. 1 Caine: 14.

Trover rests upon property and possession. Ibid:

Pleadings in trover:

The form of the Declaration is the same in every case. It states that the property was lost, came into the hands of the Deft. by finding & that he has converted it to his own use &c.

The plea is in almost every case the general issue. there are but few instances in the books where any other plea has been introduced. On this subject see 5 Brit: Trover.

Trespass vi et armis for injuries to personal property.

This has been in some degree explained under the title of Torts.

It lies in every case where the injury is immediate from the act done. Where the injury is not immediate trespass on the case is the proper action.

1 Ld Ray. 1401. 1 Str. 635.

Lawful acts may become trespass by an abuse of power to assault & make the person a trespasser ab initio. 8 Co. Rep. 146 contains all the Law on this subject & cites the authorities.

Where an officer refuses to take bail when sufficient is offered & commits the person of him it is a question which is the proper action trespass vi et armis or on the case.

When fraud or a trick is used to obtain property - as if one pretends to hire a horse when his object is to take it away, it has been determined to be theft.

The same rule as to grand & petit larceny when applies as in other

Trespass by Dogs.

J.C. has not been able to learn from the books whether trespass in it annis or on the case is the proper action in this case. some of the elementary writers treat it one way & some another.

The common law of England seems to be that a man may 4. Co. 88. Cro Car. 254.
chase cattle or other animals with a small dog. but not a large one.

A man is liable for any injury 2 Ray. 608.
done by his dog. accustomed to do mischief. In this case the rule 1 Lev. 124.
is that all are principals. Salk. 409.

By statute N.Y. the owner of 1 R.L. 276.
a dog killing, wounding or chasing
sheep is liable to the owner of
the sheep to their value. and
must kill the dog. within forty eight
hours after notice. It is also
lawful for any one to kill such
dogs. The owners of dogs that attack Ibid.
travellers shall on complaint
to a justice be ordered to kill
them within 48 hours under a
penalty.

In ordinary cases no threat or power of one person over another will justify the latter in a trespass tho' by command of the former.

A recovery against one person in this case is a bar to any subsequent action for the same injury.

Rep. El. 667. 6 Co. 7. Cartth: 96.

This action may be brot any time when not barred by the statute of limitations.

5 Mar: 214. Cro El: 32. 5 Mod. 286.

If the trespass is subsequent to the date of the writ, it will abate.

Replevin.

Replevin is a remedy granted in a distress, being a redelivery unto the first possessor of the thing distrained, on security given by him to try the right & redeliver the distress, if judgment be against him. Esp. N.P. 346

This subject is explained and regulated by the Statute of N.Y. R.L. 76.

If a person who impounds cattle keeps bad fences & the cattle get in from an adjoining field, the impounding is unlawful. But if from the highway & the fences are not commonable they may be impounded. Alias if commonable.

The inhabitants of each town at their town meetings may determine & make rules concerning common lands, fences and cattle running at large and the keeping of pounds - and the fees of fence viewers. And may impose penalties not exceeding $12.50. for each offence. R.L. 231.

Such rules must be recorded by the respective town clerks

If the fences be never so poor yet if the cattle get over the fence when it is good, they may be impounded.

Both parties in replevin are actors, and judgment as in case of non-suit, for not proceeding to trial, is never granted. 1 Johns Ca: 247.

In this action, the avowant must set forth his title, & allege the estate of which he is seized, or the avowry is bad. 1 Johns. 380.

Cattle damage feasant can not be impounded, until the damage has been ascertained by two fence viewers. 2 Johns. 196.

In avowry in replevin, when the action is for part of a year's rent, the avowant must shew that the whole has been paid, or the plea is bad. Ibid. 446.

Awards

In almost every case, awards are a bar to the action, but there are exceptions in certain peculiar cases.

An award cannot vest a title to lands, but if there is a bond to convey, in case of non performance the bond is forfeited.

Awards are judgments of arbitrators chosen by the parties constituting a court by agreement of the parties.

There award not only be an action but in certain cases lay a foundation for an action.

When there is an award an action cannot be brot on the original matter or cause of action. The law of an awards has received almost a total revolution. Indeed there has on no object been a greater change in the law.

The ancient rule on this subject was that if the award could be set aside by any possible construction it should be. But the rule is now directly reversed. It is established if possible.

An award is more binding tho' there has been no express promise to abide by the award.

If there is a promise to abide by the award, the action may be brot either on the award or the promise.

The common mode in arbitrations is to enter into a bond to abide by the award. If the award is not complied with an action may be brot on the award or the bond.

It is sometimes usual in this county to draw notes & deliver them to the arbitrators as escrow to be endorsed down by them & the sum found.

Arbitrators have not as by the power of a Court of law except enforcing their judgment but they have all the powers also of a court of equity.

They may award a collateral thing to be done, unless restrained by the parties.

They have in some cases greater power than a court of Chancery, as in title to personal property.

Their award may decide a right absolutely so as to vest it in either party.

It is laid down in the books that an award respecting lands is of no avail. By this is meant that it does not vest the property, not that it cannot be the subject of arbitration.

3. Park. 15. Vin. Kyd on Awards. 61. Vin. 63. a. N. Ten. Co: Vin. 2. 96. 430.

Deeds cannot be delivered like notes as escrows.

In Connecticut ~~then~~ law is a statute & derivation of the com. law. ~~then~~ Deeds are good as escrows and pass the estate or title.

Power of Arbitrators.

They have all the powers of a court of law, except enforcing their judgment & this a court of law will do. They have also all the powers of a court of Chancery as mentioned.

The power given to arbitrators is at all times revocable before the award is known, but the party revoking must pay the expenses that has arisen. whether the submission be by writing or parol. The party revoking is liable for breach of promise.

Kyd. 70.

Formerly upon a parol award if there was no promise to abide the award. If a collateral act was awarded to be done, it was not binding. But this law has been overruled.

1 D. Ray. 240. 12 2, 2 ib. 961. 965. 1039.

It has been a question whether if one promise for another that he shall abide the award it is good? Whether this question should have been taken, it is difficult to say, but it is now settled that this promise is good.

If there is a time specified for the arbitration in a written agreement, it cannot be extended by parol. That this has been considered a litigated question.

5 D. & C. 59.

Arbitrators are bound by the submission. which can not extend but may restrain their powers.

Where the submission is written, the revocation must be in writing also.

S. C. 80. Ky. 38 Ky.

It has been a question whether upon a contract or matter that is to be

performed. The agreement is that if any difficulty arises it shall be decided by arbitration. Shall this agreement bar a recovery in a court of law? It does not. It is only a breach of agreement for which however an action will lie. 2 D. & L. 606. 8 D. & E. 139. 1 Mills. 129. 2 Ath. 569. 2 B. & C. 396.

It has been a question whether a submission is a bar to a suit? The old authorities are that it is not which I. R. thinks correct, for the suit amounts to a revocation. Kyd however lays down the rule the other way. Kyd.

It is the general rule that any person who can contract may submit to an award.

It has been a great question whether an adult could be bound for a minor to fulfil an award. It is now settled that he can. Kyd 89.

The guardian of an infant may submit to arbitration on behalf of his ward. & a performance will be a bar & a suit by the infant will lie for the same matter. 3 Caines 253.

An executor may submit for his testator, under some disadvantages, as they can 7 Mod. 1 Bac. Ab. 591. may be to himself.

One partner cannot bind 2 Mod. 226. 1 Bac. Ab. 207. the other to an award but Kyd. 42. binds himself. Vid. 3 Caines 254.

Green & al & Beals.

Where several persons en- Kyd. 42. ter into an agreement to sub- mit & part enter into & bond to abide the award & part do not. Are they all liable? If the bonds are joint they are bound.

Whenever one empowers another for him to submit and the person empowered signs a bond to abide the award. he is not personally bound if he signs as attorney. But the principal is bound.

It has been a question whether Kyd. 45. an attorney can submit a cause in trust to Rice. He cannot. Tho by rule of a Courts of law he may refer it.

A husband has power to submit the wife's chose to arbitration where personal property is concerned. But when real property is concerned he can not submit without the consent of the wife - for he is not the owner and cannot convey unless the wife joins - Therefore he could not convey should a conveyance be awarded. Kyd. 46. 7.

Can executor or administrator bound by submission to an award without a bond? It is now settled that he is - Cro E. 600. 2 Vent. 249. 1 Ld Ray. 246. Cro Jac 99.

Who may be arbitrators?

All persons may be arbitrators except those destitute of discretion - as persons of unsound memory & Minors are incapable unless it be proved they have discretion -

Persons under the control of others are incapable to act as arbitrators - This disqualification however extends only to married women and Slaves -

Persons interested may be appointed arbitrators in the agreement of the parties -

Umpires.

Umpires are persons who are to decide in case the arbitrators cannot agree. The powers of umpires are involved in great intricacy.

An umpire may be appointed either by the parties or the arbitrators. 2 Wms 885.

It is now settled that an umpire may decide within the time allowed the arbitrators. Formerly the contrary was held. Ley & go. 2 Ves: 100. 1 Bid. 428. 454 T. Ray 1807.

It was formerly held that an arbitrator could not name an umpire but the contrary is now settled. 1 Lev. 174. 1 Ld Ray. 671. Cro Car. 263. 7. Ray. 205. 2 Dem: 645.

It was formerly disputed whether if the first person appointed as umpire refused to serve the arbitrators could appoint another. It is decided they can. 3 Lev. 263. 2 Vent. 119.

It is now settled that the arbitrators cannot decide on one part of the controversy and the umpire another.

A majority of the arbitrators cannot decide unless provision is made in the agreement of submission.

Hyd.

In such case, however, that all the arbitrators should be present - yet there have been instances where awards have been established tho' made by two only, where the other arbitrator absolutely refused to serve.

2 Barnes 53.

Arbitrators have the same powers a court has to adjourn notice being given to the parties - they cannot, as arbitrators, however, administer an oath -

2 Johns 57.

When a submission is left to the arbitration of two & if they cannot make their award within a limited time that then they may appoint an umpire; the two arbitrators must appoint an umpire before they proceed to act on the matters submitted, within the time

An award of the payment of a Receipt given by one party to the other is final and sufficient without a release 2. John: 57.

If the umpire direct that should any errors be found on the calculation of the sums awarded, on proof thereof, if the Defendant should refund the amount, this does not open the merits of the dispute, but the award is final and valid - 66.

Where the umpire was appointed of and concerning the premises, & it was stated in the award, that he took upon himself the burden of the umpirage, it is to be intended, that he awarded concerning the subject matter submitted - 96.

In an action of Debt on an award, the plaintiff need not set forth more than what is in his favor - and sufficient to support his demand - he need not shew what was awarded on both sides 96:

Where arbitrators chosen by the parties make a mistake in the calculation of the sum awarded, an action at law will not lie & court the
2 Show: 42. mistake -

The evidence of the arbitrators & proove such a mistake is inadmissible

It has been determined that a parol award is good
5 Mod. 160. where on a parol submission that the award should be binding when delivered.

Where several matters of controversy are submitted & one arbitration, the award respecting the whole must be delivered at the same time.

Arbitrators cannot receive any authority beyond the time limited. This rule applies to judicial and not
Kyd. 2 Salk 519 & ministerial acts. As
Salk. 75. that to limit per acre shall be given for lands, the lands may be measured after the award & time limited.

It is a rule that an award can extend to no matter not contained in the submission as they derive their authority wholly from that source.

Of what may an award be made? How?

It is agreed on all hands that an award of money for an injury sustained is good in all cases. But where an award is that a collateral thing be given or act done, when the submission does not mention that thing or act it is ground whether this would be good. Mr. Lyd appears to be of opinion that it is not. But Judge Reeves supposes the cases decided warrant a contrary opinion.

But if the collateral act be unreasonable the award may be set aside on that ground.

6 Mod. 221.
2 Ray. 1039.
1 Sid. 12.

Formerly when the law respecting awards was so rigid it was held that arbitrators could not award that a bond should be given for the payment of the money, but now it is settled that they have power to every appendage or incident to carry the award into execution.

It has been decided that, in case of a submission by partners, the arbitrator can dissolve the partnership. I.R. questions the correctness of the decision. 1 Bl. Rep. 475

Arbitrators may award costs - tho' formerly it was held otherwise. Co. J. 577. 10 Mod. 201. 2 Dun. 645.

It was once held that an award could not be made to convey property not owned by the parties at the time of submission.

When a release is award it was formerly holden that the award was bad for, say they differences might have arisen between the time of award & submission, therefore it was set aside in every case. But the modern authorities hold it a good award, unless differences have arisen. In that case it is not. Yet it may be data at the time of submission, and it is good. It will compel a compliance with the award.

It has been a question whether an award that a thing should be done to a stranger was good. It was formerly held that it was not. But the modern law is that if the thing is for the benefit of the parties to the arbitration the award is good.

5 Co. 77.

An award may be in some cases good in part & void in part. Therefore when an award is said to be void it is not always utterly so.

Where an award is that one of the parties shall procure a third person to sign a bond, be surety for him or the like the award is void, because unreasonable, and out of his power. Yet if the third person is willing to do the act required the award is good.

10 Co: 131.

Therefore whenever the act to be done is within the power of the person who is to perform it, the award is good.

It is a rule that the award must comprehend every thing submitted and not a part of it. This rule requires explanation. If the submission is of all controversies and only one controversy is brot before the arbitrators & the arbitrators decide thereon, the award is good tho' there are other differences. The authorities all go upon this ground that they must award about all controversies brot before them. And if they do not the award is bad. What is the meaning of the rule. Therefore the award may be less limited on the face of it than the submission, and be good notwithstanding. 5 Co. 9 b. Kyd.

There has been some difficulty about the word ita quod being a general word of submission. This law is observed & amounts to nothing in fact the ita quod is proved

the award is a decision of all the premises. This is no alteration of the former rule they must decide all controversies not before them, and are not obliged to decide any others. This is the current of authorities, but L. Reeve thinks it may operate unjustly in certain cases. The old law accords with his opinion.

When the controversies are specified in the submission if ita quod is added, the award must decide the whole. If the ita quod is not added the case is doubtful. L. Reeve thinks it should be the same but the authorities are contra.

Where the award respects ~~thing~~ matters never submitted among other things. If the award good in part or void in toto. It is good when the items are separate, so that the void part may be deducted. Otherwise not.

Hyd. 9 Co. 19. 1 Burr. 274. 4 D. & E. 146. Cro Car. 216. Cro El. 850. Cro Jac. 200. 2 Mer. 100. 1 Ves. & B. 33.

There is one singular rule to be noticed. Where joint tenants submit, the submission extends to their private as well as joint capacity. Com. Rep. 547. 1 Vin. 259.

When a thing is awarded to be done which is unlawful the award is void. Kyd. 184. 7 Dod. 78.

It was formerly a rule that damages could not be given by award when none could be given at Law, But the rule is now contrary. 2 Vent. 243

Things awarded to be done which are impossible do be performed, render the award void. 3 Mod. 272.

The rule as to impossibility is the same as in contracts.

Again, another requisite is that it must be a reasonable award. or the thing awarded to be done must be reasonable. Many cases have arisen under this head. It remains for the Courts to determine whether the thing is unreasonable or not. 3 Lev. 158. Kyd 189.

Another requisite is that the award must be for the benefit of some person or it is void.

The award must be certain so that it is known to the parties at the time of the award. in order that no dispute can arise on account of obscurity or uncertainty.

But if the award can be made certain from the nature of the thing awarded or the context, the Courts will not set it aside.

The uncertainty may be avoided or remedied by an averment as where costs are awarded you may aver the costs were so much. But where there can be no averment, the award is void, as to award $ must as is due in conscience, or as is reasonable. Such awards have happened. For authorities for the foregoing rules in the margin.

1 Burr: 227.
Cro El: 432.
Salk. 71.
5 Co. 77.
2 Ld Ray. 1254
2 Saun. 292.
2 Ld Ray. 1076.
Kyd.

Another requisite is that the award must be final: in it must put an end to the controversy.

An award must be mutual. There has been much law on this subject. The old rule has been altered and the subject is up confused than formerly. 1 Ld Ray 246 Mod. 49.

Formerly, if the award was given on one side only, it was held not to be mutual.

Altho an injury was heard an award was not good for nearly, unless it appeared on the face of the award, that it was for the injury heard. But the rule is now settled that it is not necessary for the Law presumes it for the injury. Ry & Co. 90. Cro J. 354. Com Rep: 328

The intention of the parties in the submission is to be complied with. As is also the intention of the arbitrators in the award. Brown. Rep. 92.

Whenever distinct actions exist between the parties, & the arbitrators award that they shall cease, this is a good award. 5 Mod. 35. 1 Sid. 54. 2 Ray. 612.

When are awards void & when voidable?

To explain this doctrine it will be necessary to advert to the doctrine of releases [illegible] plaintiff - For authorities to support it vid in the margin.

2 B&R. 1117. 2 Mod. 169. 2 D Ray. 1 Show 47 2. 1 L Ray 115. 10 Mod. 201.

The old law on this subject has been altered. The modern law is this.

If no injustice is like to be done by considering the good part of the award valid, it is.

If one of the parties is willing to accept that part of the award which is good when the award is in his favour, the party who is to pay can never object.

If the party who is to pay the award is willing to pay the bad party as well as the good the other party cannot object.

2 Leo. 3. 6. Ky 9. 244.

The cases all depend upon this if any injustice is done by the award, it will be set aside.

If the award is certain on one part and uncertain on the other the whole will be void, for injustice may be done Cro. Jac. 584, 597. 639. 2 Saund. 293.

It is a rule that if the party can receive the same benefit from the award by considering the bad part void, as he would by considering it good the party can never complain.

The old rule in all these cases was that if the award was void in part it was void in toto.

There is one case which has sometimes puzzled some, where the award was that a bond should be given for £50 payable in three months the bond was given but not paid, the question was whether the bond to abide the award was forfeited by non payment of the money? It is not for the act of giving the bond was a performance & tantamount to payment.

It is a general rule that the formalities required in the submission must be complied with in the award. But if the variation is totally immaterial the award is good.

Kyd.

When the award is that so much money shall be paid & a release executed by the party of all demands, if the release is executed before the payment of the money it does not destroy the demand for the money.

Kyd.

This is a rule when a note is given for settlement of difference or amounts, and a release executed in consequence of the note's being given, this subsequent and for all demands, yet if it was on the same day the note was given it does not destroy the note.

Kyd.

If the person in whose favor
award is accepts of any thing
lieu or satisfaction of the
ward, he can never afterwards
omplain.

If money is awarded to be
aid on a certain day without
any security and the money
is not paid on that day it
is a breach of the award, but
if the money is paid before
action brot, and not accepted
it is questioned whether
this is good. The old authorities held it was.

Proceedings upon a suit on an award.

If the suit is not on the case but where there is no security for the money awarded, an action of debt or indebitatus assumpsit must be brot. It must be stated in the declaration that the Plaintiff and Defr. had a controversy & what about and that they submitted it to the arbitrament of such men, appointed by mutual agreement of the parties the award & place where it was made, and the time. The conclusion in the action of debt is by this means the Defendant became indebted and in assumpsit concludes in contempt form. There is no difference between the two actions except in form.

It must be stated in every declaration that the arbitrators took upon themselves to decide the controversy.

When the award is to deliver collateral articles or the like assumpsit is not stating the same facts as when money is awarded, alleging that the Defendant thereupon assumed to do the thing stipulated in the award and that he has not done it -

Where there is an express promise to abide an award assumpsit will lie, & generally in all cases for money or the action of Debt will lie in this case. Where the award repeats collateral articles in plea assumpsit is best -

Where the award is to be paid on request, it is a question whether the request must be made before action brought 1 Saund 33.
It is prudent to make it.

Where there a variety of breaches of the award, all or a part may be stated.
It is best all should be -

The Plaintiff must not set forth more than what is in his favor & sufficient to support his demand. 2 Johns 57.

When an award is void in part and a breach is alleged on that part it all goes to the jury, the verdict is void if for the Plaintiff, but good if for the Defendant - A breach in a void part therefore cannot never be alleged.

Where the submission is under seal the declaration is the same, only the statement is the parties covenanted instead of promised to abide the award -

The common mode of submitting is by bond to abide the award - You may bring your action either on the bond or the award

Stra: 925.

It is indeed said that a bond is of a higher nature than an award, But the remedy is greater on the award -

The upper penalty in this case does not merge in the greater, which is necessary where only one remedy is had on one action but it -

After an action has been brot on one of the merits of the cause, this is a bar to another.

When the action is brot on the bond, which is the most usual, the Defendant shews the nature of the bond, prays oyer of it & recites the condition, and then procedes to plead in his plea. If his plea is that there is no award, the Plaintiff replies setting forth the award at length & the breach.

No award in a plea means no legal award. But in a rejoinder it means no award in fact.

The penal part of the bond is to be sued upon.

The Plff in his replication must shew when the award was made, so that it appear that the breach was in the time of the submission. Every thing that was necessary to be in the award by the submission must be stated.

Formerly it was necessary that the Plaintiff must state in his application, even that was necessary for the Plaintiff to do on his part. But now it is unnecessary.

2 John: 57. Where however there is a precedent act to be performed by the Plaintiff before performance by the Defendant, the Defendant must set it forth in pleading. The Plff need only state so much of the award as is sufficient to make out his demand.

If there is a material & substantial variance betwn the award in the application the Defendant may demur.

A application stating an award and no breach is not good, for it does not appear but the award may have been complied with.

yelv. 153. If the Defts does not demur but joins issue & goes to trial, if the jury find an award, it goes on & shews that there was something due -

The Plaintiff need not set forth an award unless the Defendant denies that there was one.

If the Defendant means to take advantage of this when there is no award in fact, he must deny that there is one in his rejoinder.

The Defendant may also plea performance of the award.

This may be done by reciting the award at length and the manner of performance. or he need not state this fully.

If the Plaintiff does not admit this he must traverse, if he admits it but thinks it insufficient for some defect or irregularity in the performance he demurs.

To the Plaintiffs application in the former case, the Defendant has only two defences - he must either say there is no award, or that it was an illegal one, he cannot plead performance, for that would contradict his former plea.

The Defendant may also admit the award & recite it & say that it is insufficient If this is the time award the Plaintiff can only demur but if the award is not time by stated he must traverse

If a precedent act was to be performed by the Plff. the Deft may pray oyer of the bond and recite it & state the condition & what was to be previously performed by the Plaintiff and that he has not done it. This is a good defence.

When the Deft in his plea states that the award was not made within the time of submission, the Plaintiff may rejoin that there was a subsequent agreement to prolong the time, will this avail? Where the suit is on the bond it will not for it does not affect it. But the award is good.

When there is a bond, a plea of no submission is not good for it contradicts the bond. But if there were fraud & collusion he pleads non est factum to the bond.

When the award is to be written and is delivered by parol, tho' in writing it has been questioned whether it is good. It has been decided that it is a written award delivered by parol & good.

A parol condition to a note delivered as an escrow may be proved.

When the action is on an arbitration note the Deft's plea is fuit, & this the Plff demurs, & this brings the matter before the court, whether the award is good or bad. If good the Plaintiff recovers. If not he fails.

Vid on this subject Saunders Rep. ports passim.

Submission by rule of Court.

2 R.L.R.L. 150. In the mode of proceeding in N.Y.

Post.

It where the parties come into court & inform that they have submitted their controversies & such men. This is a bone sufficient security, and execution issues by the Court if not performed. It is usually done by entering a rule of court that the parties abide by the award. The regular mode is to summon the Defendant & appear & shew cause why he should not abide. And he may come in and contest it.

There are cases where Chancery will decree a specific performance in case of collateral articles. This happens only when there is a performance on side, and an acquiescence of the other to that performance. There are cases when there is no rule of that court.

of the Defendant, who dies after the five years have expired whether another action, this institution directly after, can be maintained Qu.? 3 Caines 197.

What will take a case out of the Statute. Vid. Days Esp. Rep. 157. note.

When a number enter into a Contract and one says that he is protected by the Statute it is an acknowledgment & shall charge him. Esp. Rep. 156

When there are two debts one barred by the Statute & money is paid without directing & what debt; it may be applied by the Creditor & discharge the debt barred. 2 Caines 99.

The Clause in the act of limitations of N. Y. which excepts "accounts which concern the trade of merchandize between merchant & merchant" extends only to open & current accounts. And does not admit of a greater extension than the Stat. of James I. 2 Johns. 200.

In actions on torts there can be no waiver of the Statute. For the Defr may always plead it, tho' he had promised not to take advantage of it.

But if special damages have arisen subsequently the right of action accrues upon the special damages, and this action is never barred by the Statute. This may arise in actions of Slander for words spoken when subsequent damages arise.

It has been decided that the Statute of limitations must be construed strictly.

Under the Statute relative to possession, the person has the right of possession against all third persons, & may sue them in trespass for an entry of any other person. In England & N.Y. the time limited is twenty years in Conn. fifteen. In a Court of right in England sixty, in N.Y. twenty five years bars a covenant. This writ is not known in Conn. 15 years gives an absolute title

2 D. & L. 562.

It has been frequently liti-
gated what amounts to a
possession sufficient to con-
stitute a title or rather the
right of possession.

To make an adverse possession
in ejectment, the Defendant 2 Johns. 230
must shew a substantial
inclosure, an actual occu-
pancy, definite, positive &
notorious: a mere possession
fence: as it is called, made
by felling trees & lopping
them one upon another
round the land is not suf-
ficient.

To maintain a title on a
claim of adverse possession 1 Johns. 156.
such possession must be ad-
verse at its first commence-
ment, and continue so, un-
interruptedly for twenty years

An adverse pedis possessio for
20 years & upwards, with a cla- 1 Cains 350.
of title in other lands, which a
part of the lot, on which the
pedis possessio is taken is a bar
to a recovery in Ejectment.

A sole possession by one tenant in common amounts
1 Cain 84. to an ouster -

It has been said that this Statute operates upon mortgages against the mortgagor.

This is an erroneous idea. If a man has been in possession the time limited without any evidence of a mortgage the presumption is there was no mortgage. But this presumption may be rebutted by a variety of circumstances. Tho' there is a mortgage it must be proved that it never was settled.

After the death of a person the heirs or those claiming under him must bring
5 East. 80. an action within the time allowed by the Statute. According to late decision

accord & satisfaction,
is the next defence that may be made to actions.

Accord and satisfaction is when a man has a certain claim & agrees to take some thing in lieu thereof. The accord must always be pleaded & not that the contract or claim is paid.

It is a good defence in almost every case of personal action. In England there are a few cases in which this plea is not good, arising from a technical rule, that you cannot discharge a bond but by something of as high a nature, as a sealed instrument. This rule however is relaxing very fast. 5 Co. 44. Cro. J. 99. 550. 2 Willy. 96.

This plea is no defence in real actions because then must be pleaded. 9 Co. 79.

In Connecticut accord & satisfaction is a good plea in every personal action.

It is said that this averment must be an ample satisfaction - but this requires explanation - If it is no satisfaction or without consideration it is not good - But if it is any satisfaction, or made with the least consideration it is good & may be pleaded -

1 Rol. 820. Clow 5. 4 Mod. 88. Fitz 2 Johns. 448. contra Ut. Lumb.

An agreement never to sue a sole debtor, made on a valid consideration, or a covenant not to sue operates as a release & avoids circuity of action - But when there are two obligors, a covenant not to sue one of them, so far from releasing the demand has been repeatedly held not to protect the other obligor and that then it operates as a covenant -

2 Johns 486. 2 Fitz an Thornton cited -

It is said that if the satisfaction appear to be insufficient on the face of the plea, it is not good - but this is in some measure abolished -

Sty: 426. 1 Rol 128.

The amount due good and binding at the time of making must be certain.

Yelv. 126. Mod. 80.

The accord must be executed and received in satisfaction or it cannot be tendered to & be pleaded unless the tender is received.

The Defendant may have an action for breach of promise in case of tender refused.

Mode of pleading an accord.

According to the old mode you must set forth the accord & that the thing accorded was received in full satisfaction. The modern mode is merely to state that the accord was received in satisfaction.

A discharge or release is also a defence to an action. Tho a release must be written a discharge may be by parol. In England the release must be not only written but sealed, unless there is an express consideration,

But to render the discharge good there must be a consideration when a right has accrued previously.

Cro. J. 620. Cro. Car. 384. Ibid 177. 2 Mod. 44. 1 Ib. 205. 1 Lev. 22.

A discharge may be implied by a subsequent agreement inconsistent with the former.

If property perish in the hands of the bailee, without any default of his, it is a discharge of the contract to redeliver it.

2 Cains 121.

If a holder of a note release one of several joint makers, excepting from such liability as he may be under to the indorsers, those indorsers cannot in an action against them set up such release in discharge.

3 Cains 4.

A release of one of two joint makers of a promissory note under the insolvent act is no discharge of the other.

2 Johns. 186.

A bond not to sue amounts to a release. If the action be for to recover money paid for the defendant after the bond it would not be a release.

If a surety engage to make good the deficiency arising from a sale of goods at a given place & consigned to the person to whom the security is given, who has the whole controul of the adventure, a sale by the consignee at another place releases the surety. 1 Ca: Ca: Ab: 1.

There has been much dispute as to the extent of words - as release of all demands of all actions &c. Co. Lit. 291. Co Jac. 170.

A discharge of all demands is a discharge of all debts payable in future. Co. I. 300, 307. Co El: 606.

A contract to pay rent or a sum annually, may be destroyed by the act of the lessor - as it becomes due in consequence of the enjoyment of the estate, it is not regularly due until the end of the year. The rule before stated as to discharge of debts does not apply here until the years expire - 1 Ves. 141.

When there is a covenant to do a collateral act it is not a debt & therefore not within the rule.

Cro J. 170. 2 Mod. 281.

A discharge does not operate when the debt happens on a contingency & when the debt arises subsequently to the contingency. Tho' the discharge is of all demands.

Cro Jac. 222. 1 Yelv. 156.

There are cases when the discharge is restrained to particular cases, this happens only from the particular circumstances or the nature of the transaction.

Parol evidence may be admitted to shew the nature of the transaction & circumstances of the case, but this proof must be admitted with great caution as it is dangerous and contravenes a principle of Law - and is an exception to the general rule of law on this subject.

1 Show. 150. 5 Cath. 119. 2 Lev. 215.

In a declaration for words with special damage in every count, the Plff will be entitled to a verdict, tho' he proves no special damage, if the words are in themselves actionable. 3 Esp. R. 134

In an action for slanderous words imputing dishonesty to a Plff, the declaration is not supported by proving words which may import such a meaning but are equivocal, and may have a different meaning. 4 Esp. R. 218

Private actions on libel.

A libel is different from slander in this that it is a public offence as well as a private injury. An action will lie on words written when the words would not be actionable if spoken.

For any words written tending to make a man contemptible or ridiculous an action will lie. This distinction has been recently introduced.

2 Will 403.

By Statute of N.Y. it is declared that in prosecutions for libels the Defts may give in evidence the truth of the matter charged as libellous. Provided it appear that the publication was with good motives & for justifiable ends.

4 J. N.Y. 233.

On every indictment or information for libel the jury have a right to determine the law and the fact under the direction of the court as in other criminal cases. The Deft has still the right reserved of applying to the court to arrest the judgt.

Ib.

Malicious Prosecution.

An action for malicious prosecution is one for a public prosecution against the prosecutor, or instigator of it.

A vexatious law-suit differs only in this that it is for a private suit instituted with malicious views, where the Plaintiff knows he has no claim this must appear from the circumstances or the confession of the person.

There may be cases where the Plaintiff has a claim and yet the suit vexatious - as where the demand is 4 cents

When a Defendant is brot before a court not having jurisdiction it is malicious. 1 Salk. 14. Co. Jac. 132. 1 Saund. 228. 1 Vent. 12. 1 Roll. Abr. 106. 206. 266.

Neither in malicious prosecution or vexatious suit can the action be brot until the end of the former prosecution or suit. B. N. P. 13. to 15.

An action for a malicious prosecution will lie against a person, who caused another to be brot before a justice on 2 Johns. 203.

charge of felony, when the Justices discharged him, being satisfied there was no cause of Commitment -

2 Cains 202. To warrant the granting a Copy of the indictment & grounds an action for malicious prosecution, the malice should appear from circumstances at the trial, declarations out of Court or certificate from the judge that he thinks it ought to be granted and he may grant it, tho' he be off the bench, and has given one which proves insufficient.

Sha. 910. B.N.P. 15. This action may be brot against all the persons concerned in the prosecution.

Of the Declaration

The Declaration must state the injury to have been done vi et armis.

This is said to be necessary and originates from a feudal fine which was recoverd whenever it was inflicted, for the injury done to the public.

But this fine has been long since seperated from the declaration. I. R. therefore supposes it not necessary to insert the words vi et armis. Sed Qu.? It is at least most prudent to do so.

False Imprisonment.

Includes both assault & battery & something more.

It is not necessary to constitute false imprisonment that the person should be actually imprisoned, if he is deprived of the power of locomotion.

The imprisonment is usually under the pretense of right or power. The authority must be void or the imprisonment is legal. An authority proceeding from an erroneous judgment is good until reversed. Sometimes the person issuing the warrant or process may be sued sometimes the officer executing it. and sometimes the person procuring it.

The officer may sometimes be liable for the manner of executing the process when he has a good authority. The person procuring the void warrant is always liable to the party injured

The officer is only liable when the process is void on the face of it - 10. Co. 1 L. Ry. when the case in Co: was over in Cd. - 2 Stra: 993.

Where the warrant however is good upon the face of it but is signed by a person not having authority, the process is bad & the officer is liable.

Where several persons join in a plea, if one is guilty then judgment is against the whole - 8 Stra 809, 1104

The officer having an execution need not inquire into the judgment. 6 Salk 409.

In an action against a Sheriff for levying on wrong property & warrant a certificate that the trespass was willful & malicious, it must appear either that the execution was issued by him, or with his knowledge, for a constructive trespass does not make it voluntary - 3 Cairns. 17

Ex. defendant to be liberated from confinement, for want

& being charged in execution
trespass will not lie against
the Plaintiff and his Attorney
for imprisoning him a second
time on a ca. sa issued on
the old judgment in the suit
from which he was discha-
Cain. 267. ged, the process being only void-
able.

A fortiori if such Defendant
obtain his discharge from exe-
cution under the insolvent law
his proceeding under that act
being a confirmation of the
Ibid. 274. execution - a waiver of the
error if any.

If an action of false
imprisonment be brot for
Ibid. 90. taking the Plaintiff on a ca.
sa in which the Court am by
mistake large than those
actually awarded & the Court
will give leave & amend the
execution, and the papers on
which the application is
made may be intitled as
in the suit for false imprisonment.

If the husband prostitute his wife, L^d Mansfield & Lunden have decided that no recovery ought to be had. 3 Wils. 126.

A marriage in fact must be proven. 1 Burr. 2057.

In a feigned issue to try the fact of adultery, it was held that the confessions of the wife, corroborated with other proofs, were admissible in evidence — 1 Roby. Ca: 25

Trover.

This action in form is the same in every case. The action is now applied as well to cases where property has been unlawfully taken or when unjustly taken but concealed, or a refusal to deliver it to its owner as where property is lost or found. Formerly it was confined to the last class of cases.

2 Co. Ia: 129.

When trespass and trover are concurrent.

When the Defendant obtains possession unlawfully this action may be concurrent with the action of trespass vi et armis. And the Plff in certain cases has a right to either of the actions - and always when there is a tortious taking.

2 Co. Ca: 89. 2 Co Ia: 8 Co. 2 Co Ell: 824. 2 Ro Rep. 1217.

The action of trover is only applicable where there is a conversion - for this is the gist of the action.

There is no difference as to damages in recovery in trover & action of trespass.

of Plaintiff who delivers to a Constable a writ against the Defendant in his own suit, on which the Defendant is taken and imprisoned on the order of the Plaintiff, cannot, in an action against him by the Dft. for false imprisonment, give under the general issue, the special matter in evidence, by way of justification, under the Statute for more easy pleading in certain suits but may do it in order to shew that the Defendant was not arrested by him - but by virtue of a superior authority - 1 Caines. 25.

Adultery.

The action in this case is trespass and vi et armis, this proven by an action on the case.

There can scarcely exist a case of this kind where there will not be a recovery.

But there may be a vast difference in the sum recovered. The previous character of the husband and wife, the tranquility and peace which they had previously lived. the alienation of the affections of the wife, the probability of the husband having to maintain a spurious issue - all in damages.

The ground for exposing damages is the previous bad character of the wife. The improper disposition of the husband and his treatment to his wife. His privity and consent to the transaction.

If the taking is tortious, this is of itself a conversion - and there is no need of a demand if the tortious taking is proved. 1 Sid. 264.

Upon the same principal if the taking is lawful, you must prove the conversion. A demand & refusal is prima facie evidence of a conversion - but may be rebutted - 2 Ld. al. 5. 2 N. Rep. 902. 10 Co. Car: 262. Moor 460. 2 Mod. 245. 5 Bac: 259.

If the Defendant in trover admits that he had the goods of the Plaintiff, and that they are lost, this is sufficient evidence of a conversion - 10 Mod. Ca: 406

A demand of payment or satisfaction generally for the goods is a sufficient demand in trover - Ibid -

In some cases it may be the duty of the person detaining it - as when the true owner is unknown -

Where there has been no return of the property the judgt vests it in the Defendant & the Plaintiff recovers the value of the property -

Where A. finds property & B. claims it and obtains it by judgment of Court - the A. has made a bona fide defence to the action of B. till if C. the true owner pays A. who has the property yet in possession he will recover.

And A's remedy is a motion for a new trial & reverse the former judgment -

Where one has a special property and another the general property of a thing - both may have an action for the injury sustained - If he who has the special property sues first he recovers the value & must account with the other. But if the general property man sues first he recovers only for his injury - In this case the special Property man still has his remedy by action but - the first case the general property man has only his action against the special property man.

Latch. 214.
2 Rol. 809.
2 Ray. 913.
1 Sid. 438.
Moo. 543.
Stra. 505.

When an officer takes property by lawful warrant, when there is no claim, trover will not lie against the officer - Cartth: 38.

When a special property man has a right to the possession of the property and the general property man takes it, trover will not lie. The general property man, or bailor in a general bailment may not bring trover against the bailee - but in a special bailment he may. 5 Co. 14. Co. El. 784.

Joint tenants or tenants in common cannot bring this action against each other from the nature of the property - for each have the right of possession, and this may be given in evidence upon the general issue. 1 Salk: 290

When an action is brot against a stranger by joint tenants or tenants in common all must join in the action, or they will on a plea in abatement.

A. & B. being joint owners of certain carding machines, A. sold his half to C., and B. & C agreed to work them together. Afterwards, B. delivered the machines to a sheriff, who took and sold them on an execution against A. In action of trover brot by C. against B. for his half of the machines, it was held, that the sale from A. to C. did not sever the tenancy in common, and that trover would not lie.

2 Johns. 458.

In this action, interest on the value of the chattels from the time of the conversion may be recovered by way of damages.

Ibid. 288.

When an article has been totally destroyed one joint tenant may have trover against the other.

Machines and tools of a man's trade are not allowed to be brot into court in an action of trover.

7 Johns. 65.

In trover the court will not order an article which have been tendered to the plaintiff and refused to be struck out of the declaration.

Ibid.

Action on the case.

If a servant commit a tort for which an action vi et armis would lie against him. An action on the case is the proper remedy against the master. Cartw: 194. Stra: 1084. B.N.P. 28.

This is the proper action against all officers for false returns, or for neglecting to make returns, and for negligence.

Either case or debt may be brot against a sheriff for an escape on Ca. Sa. In case you may inquire, what was lost by the escape & the jury may give just damages as they suppose the party has sustained. Alias is debt. The Sheriffs liability is only for the original debt and damages recovered. 2 Johns. 454

Case is the proper action for the abuse of trust, as misbehaviour in professional men. Assumpsit will lie in this case but is not the usual remedy.

Action on the case is the proper action against common carriers.

In all these cases when the person is liable he has a lien upon the property he has in possession.

A rule is then made that the parties submit to the award. In case of refusal the party is subject to all the penalties & consequences of a rule of court & the court on motion will issue an attachment, which shall not be stopped or delayed by any order or process of any other court either of law or equity unless it is made to appear on oath that the arbitrators misbehaved themselves or that the award was procured by corruption or undue means.

Where there is the least corruption or gross partiality however the award will always be set aside.

Courts of Chancery have set aside awards when a mistake appears on the face of the award. This may be either a mistake in point of law or in matter of fact. 2 Vez. 705. 3 Atk. 494

If one of the parties has suppressed testimony which had it been admitted either the arbitrators will say he would have awarded differently

the award will be set aside in Chancery. The 2do one is obliged to bring forward testimony against yet he will often suffer in Chancery if he does not.

1 Atk. 77.

In case of corruption in the arbitrators an action may be brot by either of the parties against the corrupt arbitrator.

If the corruption is not discovered until the award is established at law, it may be subsequently set aside in Chancery - but the ground that it should be set aside at law -

2 Atk. 155.

2 Keg. 316.

Where an award has been made you cannot bring an action on the original cause of action. The old rule was otherwise -

In those cases where there is no new duty created on which an action can be founded, it is doubtfull whether an action

can be brot on the original
cause - Kyd supposes it can
the authorities are contra - 1 Ld Ry 248
1 Salk. 69
Kyd.

Statutes of Limitations.

There are several Statutes of limitations which may be pleaded & certain actions by them limited. These Statutes are not founded on any particular principle of justice but upon general policy.

Many things will prevent the operation of these Statutes as it respects contracts.

An acknowledgment per se is generally sufficient to render the Statute inoperative. Bun: 2620.

The great class of cases arise under the Statute of Wills. When a man directs in his will that all his debts shall be paid, those within the Statute are included.

When a man who has been a bankrupt advertizes that he will pay all his debts, those barred by the Statute are included.

Where there is a rule of that Court they will always decree a Specific performance.

The remedies heretofore contemplated are all of them intrinsic - whether the award is good or not will generally appear on the face of it.

The authorities on the foregoing rules are numerous and relate to the whole proceedings upon awards.

Cro Jac. 354. Cro El. 861. 1 Saund. 33. 169. 290 3 Burr. 1424 Cro Jac. 208 2 Ray. 823. 916 Mad. 399 1 Show. 95 Ib. 84 2 b Mod. 242 2 Vent. 72 1 Salk. 72 Yelv. 24. 78 12 Mod. 309 Cro Jac. 640 Palm 511 Cro Jac. 200 3 P Wm 90. 189 1 Atk. 745 2 Vern. 24

There are some cases where an award cannot be made in the ordinary course of law, where it will be set aside in equity.

When the award is a rule of Court, it must be remonstrated against.

Where the defect or illegality can be set forth in the plea, the award may be made at law.

All defences at law against the award arise from intrinsic causes. For extrinsic causes equity alone it is said can relieve - as for corruption in the arbitrators - Sid Quere.

2 Keg. 918. 2 Will 149. 4 Inn: 515. 485: 101. 251. 3 P Wms 362. 2 Keg. 216.

When the arbitration is by rule of court, & is procured by corruption it is void & will be set aside by any court of law or equity to as complaint
2 R.S. 157. of such corruption or undue practices be made in the court where the rule is made for submission, before the last day of the next term after such arbitration is made and published to the parties.

By Stat of N.Y. any persons,
1 R.L. 156. when there is no other remedy but by personal action or suit in equity, ~~and~~ by arbitration agree to submit their controversies to the award or umpirage of any person or persons, they may agree that such submission be made a rule of court. such agreement must be set into the submission or condition of the bond. And upon producing an affidavit thereof by the arbitrators or one of them & reading & filing the same the submission may be entered of record.

If the Defendant would take advantage of the Statute of limitations he must plead it specially at common law. Cro Car: 141. 160.

And though he plead it he cannot take advantage of the Statute & argue that it appears in evidence that the debt was barred by the Statute.

In N. York however the Deft. may give notice under the general issue, & give it in evidence. And in Connecticut it may be given in evidence under the general issue. R.L. 1. 346.

When the Statute of Limitations once begins to run it continues notwithstanding any subsequent disability. 1 Johns. 165. 2 Wilk 134.

It is a general rule that the statute of limitations does not begin to run upon the promise to pay or do the thing but from the time the debt is due or thing done.

Under the act of 21 Mar: 1783.
suspending the Statute of limi-
tations during the war, and
the act of 28th Feby '83 saving
the Plaintiffs right of action
when the Defendant was out
of the State, in an action on
a note dated 17 Dec: 1777, paya-
ble on demand, it was held
that the maker being within
the British lines during the
war & departing with the
British at the close of the
war, was to be deemed as out
of the State at that time, and
the cause of action being
considered as accruing on
the 21. March '83, the Plaintiff
having brot his action with-
in six years after the return
of the maker to the State
the latter could not avail
himself of the Statute of lim-
John Ca: 76. itations.

If an action be instituted
under the Statute of 28 March
1797. within the five years thereby
limited, and it abate by the death

No person convicted of writing or publishing a libel shall be sentenced to an imprisonment exceeding eighteen months or to pay a fine exceeding £5000. 4 Z. Ab. 233.

No person shall be prosecuted by information for writing or publishing a libel. Ibid.

The denying any disrespectful intention in a libellous publication on the Court is no justification, if the words published be in the opinion of the Court contemptuous. 1 Cains 485.

The intent of a publication will not justify it, if in the opinion of the Court, it be a contempt against them. Ibid. 518.

Sending a libellous letter to the Plaintiff himself is not a ground for an action by him. Every letter sent is presumed to be sealed. In an action for a libellous letter, the Plaintiff must shew a publication. Stating it to have been "by means of it being sent to and received by" the Plaintiff is bad, and a shewing of the fact to the court judgt. may be arrested. Ibid. 581.

In an action for a libel can the Defendant give in evidence under the general issue, the general character of the Plff 3. Cains 46. in mitigation of damages Query?

In an action for a libel the Defendant may give in evidence a former publication of the Plaintiff to which the libel was an answer, in order to explain the subject matter, occasion & intent of the Defendants publication & in mitigation of damages. But such prior publication tho' a libel on the Defendt. is not a justification of the Defendants libel, nor will it be received in evidence as Ibid. 286. Bunt.

All actions on the case for 1 R. L. 564. words must be brot within two years after the words spoken.

If the suit is in the S.C. & the Plff does not recover more than $50. he doy not recover more costs than damages.

But if A. delivers goods to B. as a mere donation to C. it may be countermanded - for in order to substantiate a parol gift an actual delivery is necessary. 1 Bay. 239. 2 Dev. 164. 1 Rep. 350-9. Stra. 955. Ch. 577. 2 Johns. 52. 16. 421. N.

See the case of Noble vs Smith.

Also Newcomb & Thus. vs. Agan -

It was formerly holden, that if no time was fixed for the redemption of the pledge, it must take place during the joint lives of the pawnor and pawnee. But it is now settled that it may be made at any time during the life of the pawnor - 4 Con 258. 2 Con Jd. 244. 2 Co. 79. 10 Bulst. 20.

If the pawnee before his death delivers the pledge to a stranger without any consideration, the tender or redemption is to be made to the representatives of the pawnee and not to the stranger. 1 Bay 498.

But if there was a good consideration for the delivery, the question whether a tender or redemption must be made to the stranger or representative of the pawnee depends upon this whether the pawnee may assign. If he may not it seems to be the case, the assignment being void no tender need be made to the assignee - 2 Com: 459. 4 Co. 178.

From a case in vernon it might be inferred that a tender ought to be made to the assignee, but this case was on the ground that the pawnor claiming must conduct equitably towards the assignee, to prevent a loss by him: rather than on the ground of a tender to the assignee.

1 Vn. 391-8.

The right of the pawn is absolutely lost on the death of the pawnor, tho' perhaps in equity it might be redeamed as is ~~to~~ by Bacon 239, note. So also if the representatives of the pawnor may recover the pledge after the pawnee has sued and recovered the debt.

If a day of payment is fixed a redemption is allowed at any period within the time, whether the pawnor is dead or alive.

4 Con. 259.
1 Bulst. 29.

The 5th kind of bailment is a delivery of goods to be carried or some act to be done about them for hire. This includes a delivery of goods to private as well as public characters in their professional characters. Jones 80. 127.

A delivery to a private person differs materially from a delivery to a common carrier. Jones 128.

This bailment being mutually advantageous to both parties the bailee is only liable for ordinary neglect. This relates to private persons. Jones 14, 32. 128. 12 Mod. 487. 1 Kent. 121.

The bailee in this kind of bailment is not liable for theft or robbery when due diligence has been observed. 1 Holt's ep. 131. 4 Co. 84. Jones 198. 2 Lev. 5.

If the articles delivered are so changed that they cannot be identified, the property in them belongs to the person to whom they are delivered. This is not a bailment but a mutuum. Jones 89. 143. 2 Bl. 404. Pop. 38. Moor. 20.

When the bailment is that the bailee do some act for the thing bailed, the law implies a two fold contract. that
1. The work shall be well performed
2. That when performed, the article shall be delivered.

But if in such case the goods are not delivered to the person in the way of his trade or profession, the law does not imply skillful-
Comy 128. 137. 11 Co. 54. a. 3 Bl: 156. Eq Dig. 501. ness in the work done.

If the goods are destroyed or lost while the work remains unfinished by the ordinary negligence of the bailee, he cannot recover of the bailor for the
2 Burr: 1592. Eq. 601. work previously done.